

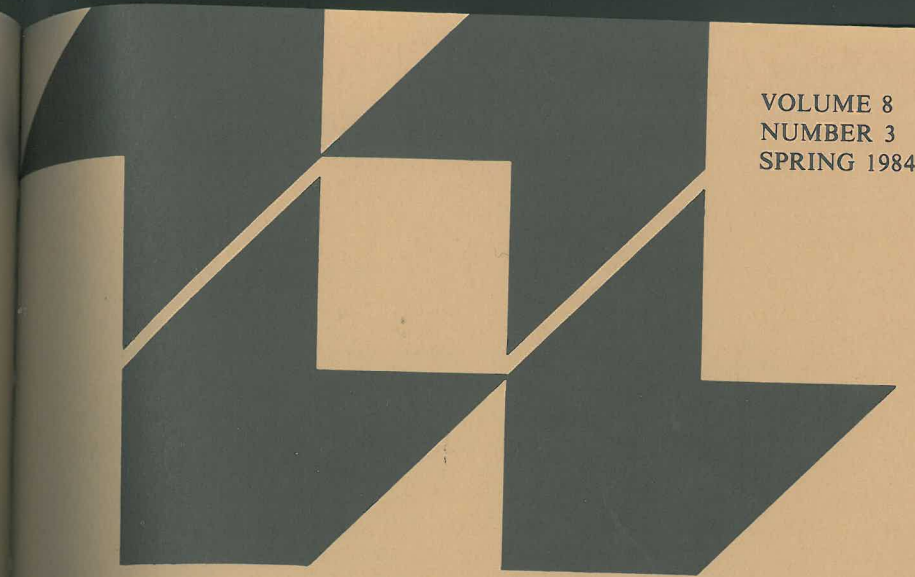
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SYMPOSIUM: WORKERS' RIGHTS AND THE NEW TECHNOLOGIES

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Some Fundamental Points and Problems

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Symposium: Workers' Rights and the New Technologies

Introduction

That technology is a pervasive aspect of modern society is one of the commonplaces of the day. Since the first Industrial Revolution less than two centuries ago, technology has burgeoned and become the real metaphysic of the twentieth century. What Jacques Ellul called *technique*—which is different from and, indeed, far exceeds technology itself—characterizes much of modern life. The intellectual disciplines of economics and politics are no longer studied conceptually as political economy. Instead, they have been technicized. So, too, has law. Little of importance in the world does not depend in some measure on technology, even in its most restricted sense of man's mechanical means to his ends.

Theoretically at least, technology was a means to achieve certain human goals. Today, however, it has reversed the means-ends equation so as to become indifferent to all the traditional human ends and values by becoming an end-in-itself. Technological change is considered to be synonymous with progress, and the underlying assumption is that through some variation on Adam Smith's invisible hand the public good is furthered by uncontrolled new technologies. That deleterious second-order consequences of those technologies can and do have significant adverse effects is obvious. Consider, for example, the technology that produced the nuclear bomb, or those that create pollution, such as acid rain and toxic waste dumps.

Nowhere are the adverse consequences of new technologies more apparent and more directly felt by millions of Americans and hundreds of millions elsewhere than in the employment relation. Today, we are enjoined to accept the notion that an acceptable rate of unemployment is seven or eight percent of the work force. That may well be optimistic, as corporate managers ever increasingly employ new technologies—and replace human beings. Some tentative movements toward combating the adverse impacts of the new technologies have started, mainly in the labor unions. Government thus far has not responded, save to buy off some worker discontent through unemployment compensation programs and the like. And corporate management has single-mindedly pursued the bottom line of profit maximization, without

regard to the human costs involved. One response to the second Industrial Revolution, in which the United States is deeply immersed, has been developed by the International Association of Machinists (IAM): a workers' "Bill of Rights." It is set forth below, with an introduction by the editors of *democracy*, where it first appeared and who have kindly granted the *Nova Law Journal* permission to reprint it.

Copies of this workers' bill of rights were circulated to a number of knowledgeable observers, in law and economics, in political science and sociology, who were asked to respond and comment upon the IAM's proposal. This symposium, thus, is a contribution to the ongoing debate about the terminal sense of the loss of work itself that is being felt by so many who wish to have jobs and cannot, largely because of the advent of new technologies.

The Editors

Technology's Politics: International Association of Machinists

In the face of record unemployment, plant closings, and capital flight abroad, America's business and political elite repeat a by-now familiar refrain. To get American economic growth going again, they say, we need to invest in new technology and to develop programs to train the unemployed in the new skills needed by that technology. Critics have pointed to the paper entrepreneurialism of fast-profit-crazed U.S. managers as one sign of the bad faith embodied in these proposals, but it is not the only one.

In testimony before the Subcommittee on Economic Stabilization of the House Committee on Banking, Finance, and Urban Affairs in July 1981, William W. Winpisinger, President of the International Association of Machinists, pointed elsewhere: to the effects of the new technology on skilled labor. The search for short-term profits has dovetailed with labor-saving technology, but where machinists once operated and serviced their machines, the new technology has encouraged job fragmentation. Machinists have been replaced by low-skilled machine operators backed up by a relatively small number of specialized service people. Unemployment has been one result of the new technology, but another has been a lowering of the skill level of the average worker.

The government, in the view of the Machinists, has aided and abetted this process in two related ways. First, it has supported voca-

tional and technical school training, which most often takes the form of specialized training, rather than the more general training obtained through collective bargaining-based apprenticeship programs. Secondly, through efforts like the Department of Defense's "Partners in Preparedness" program, the government has promoted reindustrialization programs without the benefit of public involvement and without labor representation. The result has been reductions in health and safety regulations, increased corporate tax incentives, relaxed environmental restraints, and the encouragement of more labor-saving technology. A circle is thus created that excludes the interests of skilled labor.

The machinists have responded with a proposed Bill of Rights that would address the issues that are now shunted aside or ignored. The text of that document follows.

Proposed Bill of Rights

Congress hereby amends the National Labor Relations Act, Railway Labor Act, and other appropriate Acts to declare a national labor policy through a New Technology Bill of Rights:

I

New Technology shall be used in a way that creates jobs and promotes community-wide and national full employment.

II

Unit labor cost savings and labor productivity gains resulting from the use of new technology shall be shared with workers at the local enterprise level and shall not be permitted to accrue excessively or exclusively for the gain of capital, management, and shareholders.

Reduced work hours and increased leisure time made possible by new technology shall result in no loss of real income or decline in living standards for workers affected at the local enterprise level.

III

Local communities, the states, and the nation have a right to require employers to pay a replacement tax on all machinery, equipment, robots, and production systems that displace workers, cause unemployment and thereby decrease local, state, and federal revenues.

IV

New technology shall improve the conditions of work and shall enhance and expand the opportunities for knowledge, skills and compensation of workers. Displaced workers shall be entitled to training, retraining, and subsequent job placement or reemployment.

V

New Technology shall be used to develop and strengthen the U.S. industrial base, consistent with the Full Employment goal and national security requirements, before it is licensed or otherwise exported abroad.

VI

New technology shall be evaluated in terms of worker safety and health and shall not be destructive of the workplace environment, nor shall it be used at the expense of the community's natural environment.

VII

Workers, through their trade unions and bargaining units, shall have an absolute right to participate in all phases of management deliberations and decisions that lead or could lead to the introduction of new technology or the changing of the workplace system design, work processes, and procedures for doing work, including the shutdown or transfer of work, capital, plant, and equipment.

VII

Workers shall have the right to monitor control room centers and control stations and the new technology shall not be used to monitor, measure or otherwise control the work practices and work standards of individual workers, at the point of work.

IX

Storage of an individual worker's personal data and information file by the employer shall be tightly controlled and the collection and/or release and dissemination of information with respect to race, religious, or political activities and beliefs, records of physical and mental

health disorders and treatments, records of arrests and felony charges or convictions, information concerning sexual preferences and conduct, information concerning internal and private family matters, and information regarding an individual's financial condition or credit worthiness shall not be permitted, except in rare circumstances related to health, and then only after consultation with a family-or union-appointed physician, psychiatrist, or member of the clergy. The right of an individual worker to inspect his or her personal data file shall at all times be absolute and open.

X

When the New Technology is employed in the production of military goods and services, workers, through their trade union and bargaining agent, have a right to bargain with management over the establishment of Alternative Production Committees, which shall design ways to adopt that technology to socially useful production and products in the civilian sector of the economy.

Technology, Labor Interests and the Law: Some Fundamental Points and Problems

Warren J. Samuels, A. Allan Schmid, James D. Shaffer,
Robert A. Solo, and Stephen A. Woodbury*

I.

The symposium of which this essay is a part deals with technology and law with particular reference to the interests of workers. Perhaps needless to say but nonetheless important, each of the three topics—technology, law and worker interests—has had a long history of controversy about factual or positive and normative considerations. It is *not* our intention, and certainly not our expectation, either to resolve the thorny issues involved in the three topics and their interconnections or to solve the difficult, complex, and delicate policy problems through some concrete program or panacea. It is our objective to identify the critical issues, something of what we know about them, and something of what is involved in any effort to work them out. We come, that is to say, neither to propose nor to render complete policy analysis of other's proposals but to advise as to what is involved, inevitably, in any efforts somehow to reconcile, whether through law or otherwise, the conflicts between technology and labor interests.

We believe that very deep and perennial questions are involved in any discussion of the conflicts between technology and worker interests, that these questions are involved even when not brought to the surface and directly confronted, and that we ought to make them explicit as part of our advisory, and informational, analysis. These questions include the following: Whose interests are to count, and how? Whose interests are to be made a cost to others, and how? Who is to control the introduction of new technology? Given the fundamental importance of access to jobs, how can protection of employment be institutional-

* The authors are on the faculty of Michigan State University. Warren J. Samuels is Professor of Economics; Ph.D. 1957, University of Wisconsin. A. Allan Schmid is Professor of Agricultural Economics; Ph.D. 1959, University of Wisconsin. James D. Shaffer is Professor of Agricultural Economics; Ph.D. 1951, Michigan State University. Robert A. Solo is Professor of Economics; Ph.D. 1953, Cornell University. Stephen A. Woodbury is Assistant Professor of Economics; Ph.D. 1981, University of Wisconsin.

ized? It is obvious that questions such as these involve fundamental considerations of the organization and control of the economic system.

Although we do not propose specific solutions to the policy problems inherent in our subject, our advisory analysis is predicated upon certain ultimately normative premises which ought to be made explicit: (1) That it is desirable to protect worker interests in employment. Not all such interests will be discussed, nor will the ones we do discuss be treated equally. (2) That it is desirable to facilitate and promote technological innovation. Technological development historically has been the critical factor in the improvement of living conditions for all persons, particularly in the industrialized economies, and it remains the, or at least a, prerequisite for the enlargement and enhancement of the human welfare potential. (3) That it is desirable to maintain, even to enhance, the openness and flexibility of the economic system in matters of structure and behavior. In relation to this we generally assume the continuation of private enterprise-type economic system. We note that these assumptions could be, and in the past often have been, used in connection with analyses quite different from the one undertaken here. For example, we will deal with quite fundamental points concerning the definitions of inputs and outputs, distribution, and incentives, in some respects at least quite differently from their conventional treatments.

One additional assumption ought to be made explicit. We abstract from the problem of inflation. We do this largely to render our task manageable. We do not deny the importance of inflation as a problem. We generally do feel that were political and economic wills propitious, policies could be adopted to resolve the problem of inflation, including the trade-off between inflation and unemployment, perhaps through some combination of fiscal, monetary, and incomes policies together with the (or some of the) policy options discussed below. (For example, if inflation is due, as the theorists of incomes policies maintain, to the contest over income and wealth, insofar as that contest involves the struggle for jobs, then it is plausible to argue, or at least to suggest, that resolution of the unemployment problem can possibly contribute to the defusing of the contest in its engendering of inflation.) But especially we omit inflation as a problem because we want to discuss other things. In doing so we do not intend to denigrate the difficulties of solving it.

Finally, we do want to stress the importance, both in the real world and to our analysis, of the behavioral, structural, and market, as well as performance consequences of the introduction of new policy ar-

rangments. Indeed, the analytical and practical, substantive problems of institutional innovation are no less, and perhaps much greater, than those of technological innovation. There are, for example, market consequences and problems consequent to institutional innovation. That there generally is a difference between the two forms of innovation—the consequences of technological innovation generally are not given the same policy analytic treatment as are those of institutional innovation (not that the latter all receive such treatment, by any means), especially when questions of legal change are involved—is of concern to us and accounts, in part, for the direction which some of our advisory analysis takes.

Our discussion commences with consideration of the economics of technological change in relation to unemployment, moves on to consider certain fundamental matters of institutional organization and adjustment, then to consideration of a variety of policy options, and concludes with the identification of a problem for labor interests which, while illustrative of the point made in the immediately preceding paragraph, may be of far greater significance to labor in this country than technological unemployment as such.

II.

The most conspicuous question concerns the relation of technological change to unemployment. Looking at this question from an historical perspective one must be struck by the difference in view between short term adjustment problems and long term progress. The fact is that in the advanced industrial societies during the last century or so, population has enormously increased, the fraction of the population actively engaged in production has decreased, the length of the work week has substantially decreased, and real per capita income nonetheless has increased many times over. The principal factor which has permitted these developments has been technology. The basic analysis with regard solely to employment-unemployment involves several factors.

In the case of exogenous technological change, while such change tends to be labor-saving, its effect on employment in the particular industry affected depends on several factors. Most important, it depends on the labor-intensity of the industry, the more labor-intensive the less the adverse impact on employment, and on the elasticity of demand for the industry's output, the more elastic the stronger the demand for and employment of labor. Labor-saving technological change results in lower cost of producing a given level of output. If it is assumed that the

price of the good reflects the cost of production, then price will fall with costs, and the quantity demanded of the good will rise. Hence, the more elastic the demand for the good, the greater will be the increase in quantity demanded, in response to the price drop, and the more labor, and other resources as well, will be needed to satisfy demand. As for labor intensity, the more labor-intensive is an industry to begin with, the more labor will be required to meet the increase in demand after the technological change has taken place. That is, a given technological change will have a *proportionally* larger effect on employment in an industry where employment is low to begin with, and a proportionally smaller effect on employment in an industry where employment is high to begin with. Therefore, even within a industry subject to labor-saving technological change, there is no necessary reduction in employment.

Moreover, in the event that technological change does displace workers from jobs, it is likely that workers will be reabsorbed in other industries. The result will be greater output at lower factor cost, that is, higher real per capita incomes permitted if not generated by technological change.

In the case of induced technological change, where labor-saving technological change is generated by expected future increases in wage rates, not past increases, the outcome is the same as in the case of exogenous technological change. More output is available at less resource cost after the technological change. Labor displaced from one sector is reabsorbed in some other sector.

Such, in summary, is the standard economic analysis of the matter. It has the indisputable advantage of being highly consonant with the long-term performance of the economy. There are, however, at least two immediate assumptions which differentiate the short from the long term. One is the reabsorption assumption; the other involves adjustment costs; and, of course, the two are related, although there can be short term adjustment costs even absent reabsorption problems.

The assumption that displaced labor is reabsorbed elsewhere in the economy is not always true in reality. Due to at least cyclical and structural problems, there may not be the effective demand elsewhere in the economy for the displaced workers to be reemployed. This means that the improvements due to technology have serious hardship costs for the displaced workers. The principal significance of this for both the workers (and their families) and society is obvious: In modern society, income is secured principally through access to jobs. In the absence of jobs, there is typically much human suffering. If one understands the

objective of the economy to be the production of human welfare through material productivity, not technological virtuosity or profit as an end in itself, such a situation must be understood to involve economic failure.

The traditional assumption of zero, or at most negligible, adjustment costs also is dubious. Even with reabsorption of displaced workers in other jobs, say, after a short period of frictional unemployment, there are serious adjustment costs. While these are strikingly significant for older workers, they are not necessarily negligible for younger ones and their families. Unemployment due to technological displacement may ruin a worker and his family's financial security. Relocation from one region of a country to another, loss of one's immobile assets in home and community, retraining from one set of job skills to another, damage to personal identity and confidence as well as dignity, loss of control over one's job situation—all these and other consequences of technological unemployment constitute costs which must be reckoned in any social accounting of the costs and benefits of technological change. When these adjustment costs, which likely are not negligible for many workers even in the best of times, are compounded by failure of reabsorption, the human tragedy can be severe and both the family and social consequences can be serious.

It is quite easy to make presumptuous pronouncements in such matters. However, there are numerous subtleties and complexities. Often what is transparently clear can be only one, and only a temporary, a manifestation of something much more dynamic. Often, too, what seems congruent with one's, or with society's, interest by one criterion may not be so by another which upon inspection may be given a higher ranking. And critical to the entire process is the distributional problem encompassing both power and outcomes.

III.

It perhaps ought to be acknowledged that, even in the absence of problems of unemployment and adjustment costs borne by labor, technological change is not an unmixed blessing. The economy, and indeed society, has become increasingly fragile with the development of technology and its industrial applications. In particular, the ecological systems of the workplace and the larger community and the physical and mental health of both working and nonworking populations, including the as yet unborn, have become heavily dependent upon industrial processes, the production of their necessary inputs, and the disposal of

their products and byproducts, including wastes. The human welfare potential implicit in higher production and higher productivity cannot be reckoned solely on its own terms. While most contemporary discussion takes place within a systemically and technologically laden context, there are deeper, if more relativistic and elusive, considerations which also must enter into contemplation and social decision.

The question of uncertainty and its implications also ought to be acknowledged and, indeed, emphasized. The economic future is radically unknowable; our ignorance of it is due not to lack of information but to the fact that the future will not exist and be knowable until it happens, the result of the aggregate of our actions. No one, then, can be certain of the outcome of technological change. People have different subjective views of uncertainty and the costs and benefits likely to be realized in the now-uncertain future. This difference of views, and the underlying difference of viewpoints, casts doubt on any one group having monopoly-like power in control of technological innovation. Such results in an arbitrary and skewed distribution of costs and benefits to the extent that the group with the power to make decisions acts upon its own perception of costs and benefits. To define costs and benefits is really to define for policy purposes people's property rights. Union-generated work rules thus often are held up to scorn for their adverse impact upon innovation and productivity. But these work rules operate no differently than does management decisionmaking over the adoption of new technology. Whereas union-generated decisions will tend to effectuate certain worker interests, management-generated decisions will tend to effectuate certain managerial, or corporate, interests, such as cash flow enhancement and/or timing of innovation *vis-a-vis* depreciation of an existing plant. The future is made through giving effect to such considerations. No one party takes into account in its calculations of advantage all the costs and all the benefits of their decisions. The introduction of technology will be controlled, whether by worker interests or company interests; the former is more conspicuous than the latter but both control innovation and the future, and in those regards are functionally equivalent. In this connection it perhaps also ought to be noted that there is by no means a complete set of rights enabling full participation by all persons or parties in articulating their preferences, for example, as to possible trade-offs between alternative work rules, productivity (however defined), and the type of society people may prefer to live in. In such matters people are caught in asymmetrical adversarial, not exchange, relationships.

IV.

Obviously critical to any discussion of technology and unemployment is productivity and, less obviously, critical to any discussion of productivity is distribution. Distribution is important in its own right; it also governs the level and pattern of production and of productivity with respect to which any welfare implications apropos of technology and unemployment will have meaning. We want in this connection to make a number of points; each could bear considerably more amplification than the present circumstance permits.

First, technology is both a dependent and independent variable. Most discussion of the effects of technology, as on employment and unemployment, take technological change as a given. Here we are principally interested in how distribution affects the consequences wrought by technological change. But technology also is a dependent variable; even when denominated exogenous (*vis-a-vis* induced), it is generated by operative factors one of which is power. The distribution of power governs the allocation of resources to research and development whence cometh new technology. The distribution of power helps govern the adoption of technology. Considerations of power enter into the development and adoption of technology, not productivity considerations alone. Moreover, while technology can be perceived as an imperative force driving industrial structure and evolution, extant technology does comprise an array of production alternatives. The very largest level plant is not necessarily the most efficient. Choice between technologically modern production systems is not based solely on costs; considerations of strategic advantage in a system of power also enter into the decisions.

Second, technological innovation is the principal vehicle of the process of creative destruction deemed by Joseph Schumpeter in his work *Capitalism, Socialism, and Democracy*, to deeply mark the modern industrial capitalist system. There is creativity and there is destruction. The creativity and the destruction are not always distributed proportionally, indeed, they rarely if ever are.

Third, if the problem of technology in relation to material progress and employment-unemployment is one of managing technological advance, that advance can be managed in different ways and in different directions. Both the generation and the (creative and destructive) effects of new technology will depend in part upon the distribution of power. The distribution of rights, governing whose interests will count, for example, as a cost to others, will channel the cost-price structure in terms of which costs and benefits will tend to be reckoned and with

respect to which any utilitarian judgment thus reached will be tautological. A different structure of rights will lead to a different generation or configuration of technology and a different set of market outcomes. The management of technological advance will be a function of the distribution of power and the rationalization of the outcomes of technological advance will be on terms generally presuming that distribution of power.

Fourth, more broadly, it is true both that distribution is a function of market forces and that market forces are a function of distributional, that is, structural factors. The actually achieved outcome in an economy is not one that has been predetermined. It is the outcome of a complex network of interrelationships and decisions at the bottom of which is an existential circularity between structure and performance at the core of which is distribution.

Fifth, unemployment therefore can be contemplated to be a function not so much of technological advance and displacement but of the structure of power which channels technological change and development. Any notion that unemployment is "natural" is specific, at best, to the extant structure of power. There is no necessary reason in the nature of the economy that technological change and employment be in conflict. There is no reason why the power structure which channels both technology and employment-unemployment cannot be altered to enhance employment and to minimize the adjustment costs borne by labor, whether or not the reabsorption assumption is found, or made, to hold. Technology can be introduced in ways which cater to the interests of those who would otherwise be injured. Barriers to entry can be eroded if not totally eliminated; barriers to employment as such, for example, on the basis of age, similarly can be reduced. To the extent that unemployment is power-structure specific, unemployment can be reduced through changes in power structure, changes which, among other things, would take more into account the interests of those so adversely affected by technology. The same point applies to unemployment due to other causes, for example, cyclical instability.

Sixth, there are several points to be made concerning productivity. First, productivity is not only a physical matter. It is a matter of creation of value, for example, as "determined" through market forces or through political decision, the supply and demand of automobiles and pizza pies in the former instance and of bombers and missiles in the latter. As such, productivity is highly, indeed ultimately, circumstantial. An increase in the demand for a product, for example, will increase the value productivity of the workers engaged in its production

even if they do nothing differently. Second, productivity is a collective phenomenon. Although our ideology and, to some extent, our economic theory of distribution, which in this respect if in no other is heavily influenced by our ideology, affirm distribution in accordance with individual productivity, in reality what we produce and how much we produce is a function of a vast collective enterprise extending over several generations. We receive individual factor incomes, wages, etcetera, but those incomes represent in the aggregate both individual hard work and the total productive organization and operation of society within which, and only within which, that hard work can be effective. Considerations of individual productivity cannot properly be invoked to counter proposals for structural or distributional change in order to effectuate alterations in economic performance, for example, in unemployment.

Seventh, it should be clear that both the existence and the distribution of the benefits and costs due to technological change are governed by the distribution of power. Corporate profits and costs, labor gains and costs, the direction taken by the mediating role of government (law)—these and other factors are given existential substance by distributional or structural factors. Who receives what benefits and who bears what costs are questions not written in stone but have “answers” or “solutions” reached on the basis of the distribution of power and of power play undertaken thereon. Power play determines whose interest is protected and effectuated. Power play governs the circumstances and the manner in which new technology is introduced, who gains, and who loses.

Eighth, it should be clear that new institutions can be adopted to channel the market and to affect the genesis and distribution of the benefits and costs of new technology. Existing institutions are not written in stone; they, too, have been the product of institutional evolution and adjustment; that process continues. Whatever one may think of the “self-adjusting” market, the market operates within and gives effect to the institutions which form and channel it. “Productivity” as conventionally reckoned emerges only within, and in a sense tautological with and specific to, the institutions which form and channel the market and the operation of the market as such. To judge proposed new institutions deficient or inefficient on the basis of market outcomes (for example, the extant cost-price structure) produced by the existing institutional configuration is to give effect to the latter. Whereas a new institutional structure would produce outcomes, including a new cost-price structure, by which the extant ones would be deficient. There is no metacriterion by which conclusively to choose between them, although

existential choices are made through decisions leading to institutional alteration and adjustment.

Ninth, if the introduction of technology and the accrual of profits therefrom are partly a function of the state of the law, which helps govern power structure through determining relative rights, then it is understandable that various interest groups will attempt to influence the law in its governance of technology and profit. In the nineteenth century, for example, capital accumulation was abetted by a legal system which, in part through various legal defenses against worker legal action, distributed the risks of production away from capital owners to workers. This situation continued well into the twentieth century when it was partly, perhaps substantially, altered through workers' compensation statutes and various developments in tort and statute law establishing and sanctioning warranties and other modes of consumer protection. It is not surprising, therefore, nor is it novel in principle, for the International Association of Machinists (IAM) "New Technology Bill of Rights" to attempt to protect the interests of workers already in jobs. But, if the nineteenth century approach achieved accumulation of capital through the establishment of a privileged position for capital owners, the IAM approach protects against unemployment through a privileged position for the already employed, neglecting those who are unemployed and who are not so well employed. To say that is not to denigrate their proposal. Whatever "solution" to the continuing problem of technology and employment-unemployment is worked out, it will come about largely through various groups doing what comparable groups always have done, namely, seek to protect and effectuate their interests. It is one of the ironies of the traditional reabsorption assumption, however, that a tension exists between the frequently unrealistic assumption of reabsorption capacity and the efforts, due in part to the absence of reabsorption opportunities and in part to traditional internal protectionist motives, to establish privileged positions. Still, the manner and mode of the introduction of technology does bear on worker interests and is worked out through institutional rearrangements, and, it is important to note, it is tendentious to call "privileged" what is the result of necessary efforts to (re)determine the institutions which govern that manner and mode.

Tenth, it is important to note that when law abetted the accumulation of capital through legal arrangements shifting risk away from capital to consumers and to workers, it was not some abstract category "capital" which was maximized. What is called "capital" in all such discussions is really a vector of a multiplicity of components and not a

one-dimensional thing which can be given a simple and singular ordering. For example, machinery can be produced with greater or lesser attention, through various design features and protective devices, to worker safety, and with lesser or greater designed tolerance levels affecting the use and safety of the finished product for consumers. Overall more "capital" in some sense was accumulated than otherwise would have been, but it is important to recognize that the law affected the structure of accumulation, and the structure of production, consumption, and employment as well.

Eleventh, the distributional problem applies not only between capital and labor but also within the ranks of labor, particularly organized labor. Trade unions, in their bargaining over wages, hours and working conditions, for example, must contemplate the trade-off between total labor remuneration and the employment level. All other things being equal, a richer bargaining package may be enjoyed by the union members who continue to have jobs but not by those who arguably are displaced in the process as company management adjusts the size of its workforce (level of employment) to the new price of labor. There is, willy nilly, a distribution of benefits and distribution of costs. Not all union members will be in the position denominated above as "privileged." More will be said of this situation below.

Twelfth, it must be stressed that the protection by law, or for that matter by contract, of one's interests *is* important to the enhancement of one's opportunity set and realization of one's interests. It is better to have rights than not to have them. Two additional points, however, must be juxtaposed thereto. First, the rights and opportunities of one party often tend to correlate with costs and denial of opportunities imposed on others. To say this, of course, is not by itself to denigrate the protection of interests, through rights, for any party. It is, rather, to state an existential fact and condition, thereby underscoring the necessity of choice as to whose interests are to count, in part as a cost to others. Second, the protection given by law and/or by contract to one party's interests always is problematic and circumstantial, a function of the operation of other rights and, *inter alia*, market conditions and behavioral responses. Thus, for example, protection of worker interests within a firm, for those who continue to have jobs, may expose those jobs, and the viability of the firm itself, to the competitive drive of other firms who have been able to avoid the need similarly to protect worker interests. Protection of interests in one firm or group of firms actually may generate a market for those employers who can induce workers to work with no or appreciably less protection of their putative

interests, thereby enabling the new firms to outcompete with existing ones. There are limits to the effectiveness of collective action at the subgroup level, a lesson which historically led to the adoption of unemployment compensation as a requirement at the national level in order to prevent interstate rivalry, at the behest of intrastate business interests, reducing the scope and level of benefits. Within the private sector, the "progressive" employer may be unable to compete with less socially conscious firms.

Thirteenth, there is tendency to adopt a managerial[ist] approach in considering questions such as those under review here. It is easy to agree, or to see, that there must be an incentive system driving the labor force. It is easy to assert some "natural" rate of unemployment which operates to diminish our appreciation of the personal and social cost of unemployment. It is easy to hypothesize the voluntary nature of unemployment consequent to a view that given a willingness to accept a lower wage rate there would be no unemployment, so that any unemployment is voluntary due to a refusal to accept the lower wage rate. But reality is much more complex than these positions tend to recognize. Even with workers willing to accept lower wage rates, there may not be jobs for them. The level of offered employment may be limited by the level of planned output, which in turn may be adversely affected by the condition of unemployment. Lower wage rates may only dry up effective demand and, with it, jobs. Given that there always is an incentive and reward system, the question is not whether to have one but *which* one, a question to which we shall momentarily return.

V.

Most conventional analysis—partial static equilibrium microeconomics and welfare economics—takes technology and input and output definitions, among other things, as given. But one of the consequences of technology is the reformulation of the meaning—the very nature or economic significance—of inputs and outputs. New technology means new outputs, new forms of old outputs, and altered economic significance or meaning of inputs. This is manifestly important in its own right but it points to an even more fundamental and broader underlying process: the definition of output. The output of the automobile industry obviously is automobiles but to stop there, as does much discussion, is unduly to narrow the scope of analysis and understanding. The output of the automobile industry, what people seek and get from it, includes not only transportation vehicles but jobs; incomes in the

form of wages, salaries, and dividends; and, in a profound sense, mankind or humanity itself. As writers of different political persuasions have pointed out, the principal product of industry is people, the nature of the human being who is shaped and cultivated by industry. This is an important philosophical point; it is of enormous cultural and ethical significance. But it also is of vast practical importance. The output of the automobile industry is the physical automobile plus *some* quantum element of worker, consumer, and third-party safety. The effect of occupational and health safety regulation, of consumer protection legislation, and of environmental protection regulation is to redetermine the legal definition of commodities. The "effective commodity" is what it is because of the sum of and interplay between market and legal forces. To maximize output, or the value of output, first requires a determination of the definition of output, and also of input[s], and this involves determining whose interest is to be protected, in part by making them a cost to others. This is done, in part, through legal rights or the functional equivalent of rights, as in safety and environmental protection legislation.

It has been appreciated for some time by all except the most naive or reactionary that in the absence of protective legislation, workers (and also consumers) will bear the brunt of market adjustments and risk. Labor is particularly exposed to technological change and rarely has the economic wherewithal to sustain the economic destruction visited upon it by economic creation. Even more generally, there are overhead costs, to use John Maurice Clark's felicitous term, as described in his book *Studies in the Economics of Overhead Costs*, of labor just as there are of capital. The cost of maintaining, of sustaining, and of [re]training the worker and his progeny is important. They are as pertinent to the production enterprise—on the levels of both the individual firm, or plant, and society as a whole—as they are to the family unit. But these human capital costs are conventionally handled as consumption costs. The production enterprise, insofar as it can depend on the treatment of such expenses as consumption items by households, is able to achieve the externalization of those costs every bit as much as it does when it is able to pollute the air or water and shift costs to create externalities for others. If external costs and benefits must be taken into account in that area, so too must the displacement and other costs of technological innovation and adjustment be reckoned in the evaluation.

One way to do this is to include in the rights which define inputs and outputs the costs, or the provision for the costs, of displacement

and retraining of workers in the case of technological innovation. This can be accomplished through negotiation or custom at the level of the individual company or plant. But such a solution is exposed, as indicated earlier, to the competition from those companies who are able, for whatever reason, to avoid the internalization of costs, whether they be of conventional externalities or of labor displacement, which can readily be included among the other externalities. But whether it is done, and however it is done, providing the protection is tantamount to redefining inputs and outputs, here to include the internalization of cost which otherwise and hitherto has been borne by households. A "Worker Impact Statement," much as an environmental impact statement (or what Kenneth Boulding has called for in *The Economy of Love and Fear*, a distributional impact statement), would identify the costs shifted to others by technological innovation and permit the hopefully rational deliberation of solutions to the problems posed thereby.

VI.

One of the arguments frequently encountered in discussions of adjusting the impact of technological change on workers is that any such adjustments may have (undesirable) incentive—disincentive—effects on workers. It is, as noted above, easy to adopt a managerialist approach, to more or less blindly consider the need to maximize output and thereby to maximize pressures—rewards and incentives—on workers to produce. But technological innovation is something to which workers adjust; their actions and demands have some impact upon the innovation process but they are not the critical actors. Moreover, there always is *some* incentive system. The operative question is not whether but which, whose, for what ends. Once it is recalled that incentive systems operate to maximize or optimize production of output, and that the definition of output involves a necessary prior determination of which/whose interests are to count as a cost to others, the objection that any such redetermination of the definition of output will adversely affect incentives to produce is tautological with and gives an effect to the preexisting definition of output, whereas the critical point at issue is precisely the definition of output thence to be maximized or optimized. Stated differently but to the same effect, optimization requires a definition of that which is to be optimized and that, and not the role of incentives per se, is typically what is at issue. Too much of the static conventional analysis obscures the process by which the ends of the incentive system are determined as well as such questions (and their

respective and interacting governing processes) as who determines, why, and with what consequences.

One must be wary not only of a managerialist perspective, in which one assumes the position and point of view of the employer-manager of labor, but also that of expert technician. Inasmuch as *any* determinative decision regarding production and costs is predicated upon *some* definition of output, and *some* disposition of potentially externalized costs, such as pollution or worker retraining, one must ask of the expert advisor or expertise-based decisionmaker precisely on what values his decisions are predicated. These definitions are not fully given to the engineer, scientist, lawyer, economist, or manager. They are made through a process of decisionmaking which is profoundly influenced by power, that is, by forces governing whose interests are to be made a cost to someone else. That the someone else may not realize that they are bearing costs due to the policy decisions of others, or that the someone else may somehow respond in one behavioral fashion or another, does not negate the fact that for the moment at least the someone else is in the disadvantaged position of having to bear costs visited upon them by others. Rights structure and channel incentives, and rights can be exercised, *de jure* or *de facto*, by technicians of various types who, so far as they know or are concerned, are only doing *their* job.

VII.

The principal policy strategy which government can pursue is that of full employment. There must be sufficient aggregate effective demand to sustain a full employment economy. This must be combined with other policies and programs, such as manpower retraining. Deliberate generation of unemployment in pursuit of the control of inflation is extremely undesirable; it is much more an admission of failure than of any success in combating inflation. Deliberate generation of unemployment to control labor power in the market and in collective bargaining also is extremely undesirable. It is inhumane deliberately to deny through public policy access to jobs and income so necessary for most persons. The active pursuit of full employment is not guaranteed of success, especially in light of our correlative failure to contain inflation and our experience with stagflation, simultaneously increasing rates of both inflation and unemployment. Especially must we avoid, if not utterly dispel, the *laissez faire* idea that problems will solve themselves, that the economy is at an optimal level or condition no matter what the level of unemployment, because anyone can get a job if only

they would lower their desired wage rate, so that if they are out of work it is voluntary, not involuntary, unemployment. The fictions and tautologies by which certain writers attempt to prove that the present is the best of all possible worlds staggers the imagination. Policy must promote a stable price level, full employment, and dynamic technological change. Failure to promote and to achieve full employment denies access to jobs and income for those who require such to live, absolutely wastes productive capacity of the society, denies businessmen the opportunity to engage in profit-making activity, and destroys the ostensible fundamental *raison d'être* of the economic system.

VIII.

One of the major points which we want to make is that the promotion of labor interests *vis-a-vis* technology is not a simple matter. No single partial solution is adequate nor is a general solution possible. There are fundamental, systemic problems which cannot be solved from only one perspective, nor only once for all time and for all people. However, an array of partial solutions can be worked out. This brings us to another major point of ours: Society, that is, the competing interest groups which comprise society not all of which are equally well organized, must work out the array of partial solutions. The array which is worked out will be a function of the power structure which governs whose interests are to count. Inasmuch as it is precisely the question of whose interests are to count—when interests centering on employment, profit, and technology are in conflict—which policy must address, for us to assert certain policies as conclusive (not to say effective!) would be for us to assume whose interests are to count. This we refrain from doing, in part because (and not surprisingly!) we do not agree on major issues of strategy, in part because some of us are unwilling to be presumptive as to whose interests are to count. But this diffidence does not completely disarm the policy analyst. We can articulate a variety of options, a number of critical considerations, and the relevant experience of other countries, the latter without any assumption that institutional transference between societies is either necessarily desirable or easy.

We first note several critical considerations. The first is to underscore the desirability of maintaining flexibility and openness. This is a subtle matter, if for no other reason than that anyone could point to an established right, for example, a property right, a collective bargaining right, a contractual right, or a welfare entitlement right, and assert

that the system would be more flexible and/or more open without such a right and its protected interest. In every system there will be and must be rights or the functional equivalent of rights. The issue is not rights or no rights but which rights. Nonetheless the policy analyst can attempt to identify the interests omitted or damaged by the institutionalization of a right or, for that matter, the deinstitutionalization of a right. (Regulation is the creation or logical equivalent of a right; deregulation engenders the opposite right.¹) Thus, one can distinguish between the right to the job which one presently holds and the right to a job. One can also distinguish between policies which protect the already protected, and which may further burden others, and policies which extend the range of protection. Thus, certain policies advocated by the IAM proposals can be interpreted as protecting an existing labor aristocracy while neglecting the unemployed and other employed workers with differentially lower capacity to assert themselves. Such considerations do not operate conclusively to rebut the IAM proposals but do raise questions of who else's interests might also be protected. Some policies, of course, protect both those already protected and those not yet protected; and others protect the hitherto unprotected. Perhaps one would want to avoid as far as possible a resurgence of neomercantilist protectionism selectively pursued on the basis of power and influence. Yet even here labor may well have been taught by organized business which historically has pursued protection (and not always and probably not most importantly through tariffs and quotas), often with the support of the particular industry's unions.

Second, we want to reaffirm the importance of the behavioral consequences of any policy innovation or new institutional arrangement. The most fundamental limit which we observe constraining the IAM approach is that the firms which in good conscience attempt to cooperate and pursue its noble goals may find themselves unable to compete with other firms, domestic or foreign, which are able to introduce technology without the internalization of costs as prescribed by the IAM's New Technology Bill of Rights. Such a predicament would threaten the demise of the firms, the union, and the policy goals, as well as severely damage the workers whose protection is sought.

This brings us to our third critical consideration. Do we want to provide, or somehow work out, protection for workers on the level of

1. See Warren J. Samuels, A. Allan Schmid And James D. Shaffer, *Regulation and Regulatory Reform: Some Fundamental Conceptions*, in W. SAMUELS AND A. SCHMID, *LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE* 248-66 (1981).

the individual firm, perhaps the individual plant, or on some more encompassing level? Many systems of worker protection around the world are on an enterprise basis, for example, Japanese lifetime employment guarantees and Soviet welfare benefits. This provides for greater local flexibility but at the price of systemic inflexibility because one is reluctant to leave an employer if one cannot transfer accumulated benefits. There also is the problem addressed above of opportunities for other firms to exploit benefit and protection differentials. Finally, there is the problem that workers, and of course nonworkers, not covered by such protective arrangements will not be protected at all, indeed may even be the recipient of residual economic risk and injury. A comparable consideration is that what will work, by some criterion, for large corporations may not work for small firms. This can be understood to be a general problem but also one which is still more critical if the economy is understood to be divided between a multiplicity of more or less price-competitive and exposed firms, and relative few largely, but by no means completely insulated, corporate giants who administer their own profits and markets.

Our fourth critical consideration also is one on which it is easy but extremely presumptuous to speak in a seemingly conclusive fashion. Nonetheless, the point is important. With rights, we are tempted to urge, must go obligations. Precisely what they are to be must be worked out; certainly it involves the potential surrender of valuable advantages, perhaps even of rights. For *illustrative* purposes, were labor unions to succeed in acquiring the protection sought in the IAM Bill of Rights, arguably one could urge, in the name of greater economic flexibility and openness, that dubious work rules be eliminated, that jurisdictional disputes be severely moderated, that protectionist opposition to patently beneficial technological innovation be reduced, and perhaps even that restraint on wage increases be exercised, and that more use be made of binding arbitration.

IX.

Let us consider a variety of arrangements each of which arguably possesses certain capacity to enhance the position of workers *vis-a-vis* technological innovation. Let us also note that each arrangement may have significance in terms of larger and/or different considerations than those relevant to this discussion.

(1) One method of enhancing labor's position, specifically the position of individual workers, is through the adoption of employee stock

option plans (ESOPs). These can have the effect of both enhancing worker interests in the financial and operating viability of the company for which each works as well as securing a form of nonlabor income, dividend income and appreciation from property. Of course, employees can prefer the opportunity to pursue other investment, or consumption, options. Indeed, the criterion of diversification of risks may suggest that worker security portfolios not be heavily weighted in the stock of the company for which they work. Moreover, such a solution can at best cover only a modicum of insecurity and for only a fraction of the society.

(2) Another method is the creation, in part through the modification of existing programs, of effective and honored programs which establish a social floor (or minima) below which worker income will not be allowed to fall in the event of economic dislocation or disaster. A society which recognizes the exigent necessity of a job in order to have income will not only promote effective full employment policies but, also recognizing the collective nature of productivity, will provide unemployment compensation and perhaps other supplements in order to maintain an effective floor of protection. This can occur apropos of both cyclical and technological (and other structural) unemployment. To the extent, paradoxically, that other programs are successful, such as full employment and manpower training, such programs will be of generally secondary significance but of great personal importance for those who must avail themselves of their benefits.

Much to the same effect would be institutionalization of a guarantee of employment and adequate income. This could be achieved through programs implementing government as the employer of last resort and wage supplements. The point is to recognize and give effect to an overriding social obligation to provide employment and income.

(3) Extremely important is the adoption of effective manpower training and retraining programs. These programs must be directed to and available for both the unemployed, or prospectively unemployed, and the underclass who have as yet not been socialized into the labor force. There must be general training programs, union apprenticeship programs—whatever array is necessary to train, upgrade, retrain, and modernize worker skills, skills which are necessary simultaneously for the collective productive enterprise and for the individual earning of incomes.

The United States has a long way to go in manpower training programs. Existing programs have often trained workers for jobs that were not in increasing demand. Also, the "training" programs often involved

little real training. Finally, the programs often failed to devote attention to placing workers in jobs. Retraining programs will have to be redesigned to avoid the problems which have arisen in the past. Retraining must be technically effective, for jobs which will exist, and in an environment of adequate aggregate effective demand. Moreover, retraining for the purpose of producing enhanced supplies of certain skills should lead to the production of new output and not the driving down of the wage rates of workers already in the market.

We must appreciate that job creation, through full employment policies, and manpower retraining are very attractive, for the reasons given above and also specifically because the displaced workers are likely candidates for re-employment. But manpower retraining programs cannot be allowed to retain the image that they are for failures or losers. Such programs must be recognized by all as a vital component of the collective productive enterprise.

Other countries, principally in Western Europe, have developed and utilized manpower training programs as part of larger national ventures. In Sweden, for example, the combination of full employment policies and manpower retraining programs (along with "subsidized" income supplements) has meant that workers have come to share with employers a recognition that technological proficiency is necessary for domestic full employment, competitive position in foreign trade, and profitable business enterprise. As in France, manpower training programs are coordinated with other collective efforts, private and public, to channel investment and production in desired directions, thus generating training in advance and in anticipation of needs. Manpower training programs can be vital and contributing factor in a technologically progressive society. They can be programs in which participation carries no stigma of failure but rather the badge and prospect of continued participation and advancement.

(4) Sweden, it also may be pointed out, has an array of public and private arrangements which promote full employment and price stability which generally have been quite effective in the past (although somewhat less so in recent years). In addition to the usual array of government monetary and fiscal policies, the Swedish government employs countercyclical public investment programs in areas of ordinary public production of social capital, such as roads, public buildings, public utilities, and so on. Local governments are accommodated by the central government in participating in such programs. In addition, tax laws provide lower corporate net income taxes for corporations which set aside in an investment reserve fund monies which are spent or not

spent in accordance with countercyclical policies and timing established by the government. Thus, both public and private spending readily can be generated to combat prospective contraction, and both spendings can be moderated to combat prospective inflation, all with minimal jockeying for legislative favor and largesse, because the enabling statutes are already in place and ready for use.

(5) Certain Italian experience also is suggestive. In the Italian automobile supply industry, small firms which have developed through subcontracting have generated both the learning of new skills by artisans and the development of new technology and skills in nonautomotive lines. These firms are centers of technological creativity in which the workers themselves are prime movers. The implication is clear: Notwithstanding the decline of the United States automobile industry, there are thousands of skilled tool and die makers, machine shops, and other firms which have constituted the infrastructure of the auto industry. They comprise a resource which can be further developed and can contribute both to the collective productive enterprise and to jobs and career opportunities for the present and future generations of highly skilled, indeed technologically proficient, workers. Conceivably this can be part of a larger program to develop flexibility in production, variety in outputs, and stream of innovation, with quality products now geared to the mass market, now geared to special needs, all based on skills that cannot be simply transferred or easily replicated or reproduced. This can be done in large corporations but it also can be done, and perhaps more readily, in small enterprise, thereby also nourishing competition, a powerful base for high technology, production flexibility, capacity for product modification, output diversity, and opportunities for innovation, all with the universal further development and dense application of labor skill. One also can envisage sets of geographically proximate if not contiguous firms with complementary skills and capabilities, sharing their skills and machine facilities informally and collaborating through cooperative arrangements for the provision of jointly required inputs and the production and marketing of jointly produced outputs. There also is some relevant Japanese experience which can be drawn on in such matters.

(6) Other Japanese experience is perhaps even more suggestive. In addition to the (nonuniversal) practice of lifetime employment, apropos of which workers are protected against technologically (and otherwise) based dislocation by internal policies which effectively consider worker incomes an overhead cost, workers systematically share in the net benefits of technological innovation through biannual bonuses based on en-

terprise profits. Workers are thus given protection in a manner which at the same time constitutes incentives to promote technological innovation, as is accomplished through other institutional arrangements, for example, in Sweden.

It is possible to institutionalize through collective bargaining the obligation of individual companies to retain workers except, perhaps, in the most extraordinary circumstances of financial exigency. Doing so would create incentives within the firms for the effective retraining of workers. The problem here is that competitors not so obligated will tend to have market advantages. This may suggest that legislation could operate to institutionalize such arrangements in the large corporations, though the competitive problem would still arise in re small competitors. The point is to create institutions with the socially functional incentives.

In this and in other connections, it may be pertinent to point out that Japanese and other Western European managers tend to have longer profit horizons than does United States management, and perhaps tend to devote somewhat less attention to short run cash flow and to financial maneuvers geared much more to corporate power (and security) through diversificatory acquisitions often directed at cash flow and much less to considerations of enhanced physical production.

X.

One of the principal concerns which seems to have led to the IAM proposal for a New Technology Bill of Rights is the threatened displacement of skilled workers. Surely the acquisition and utilization of skills is satisfying to the worker and of value to society. Surely, too, the premiums which skilled workers command are at least in part a function of their relative scarcity; if the supply of skilled workers were larger, their utilization may be no less enjoyable, but they likely would command lower relative incomes. Moreover, as is the case with the professions, there may be a tendency for the skilled to use their skills as a weapon over others; arguments predicated upon skill tend often to be as presumptive as many others and to be used as reinforcers of established power positions.

Perhaps the critical point, however, is that the continued development of skills is more important than the maintenance of protected markets for already acquired skills. Yesterday's skilled craftsman can be today's and tomorrow's skilled technician, engineer, or programmer. The robotic displacement of skills likely means demand for new skills.

Once again the distinction must be drawn between the right to the job which one is in and the right to a job. Surely, too, in a dynamic world of technological innovation the already skilled tend to have the advantage over the unskilled in regard to the learning of new skills, even though they may prefer to maintain the status quo of their old skills, sometimes also to the disadvantage of consumers.

If it is true, or to the extent that it is true, that the concern over displacement of skills is a defensive reaction, such reaction may be overcome or finessed by effective retraining programs both within and outside of industry. Without denigrating the instinct of workmanship engendered by skilled work and all the pride and joy that goes with it, the critical problems arguably are, first, jobs per se, and, second, minimal dislocation and adjustment problems. In a society in which such problems were largely avoided, the progression from skill to skill through retraining in response to technological innovation would be itself a matter of pride rather than the occasion for fear.

That workers, especially skilled workers, engage in defensive maneuvers and arguments, is neither surprising nor indefensible. The possession of skills constitutes the effective property holdings of workers and there is no reason why they should be less interested in the defense of their positions than any other owners of property.

XI.

Much of the IAM Bill of Rights amounts to further extension of the participation by workers, or their representatives, in the decision-making process of the organizations for which they work. There are two important but contrasting points which we want to make here. First, if one believes that individuals should participate in the making of decisions which directly, and perhaps indirectly as well, affect them, then worker participation in what hitherto has been the preserve of management is to be applauded. Without economic democracy, it can be and indeed has been argued, political democracy may be a sham. If the boss on the job has the prerogatives of the landlord of the feudal past, the worker is still the hired hand, a second class factor of production and, by extension, citizen and being. Second, however, it seems to be the case that under worker-managed systems not all workers are interested in taking advantage of opportunities to participate in decisionmaking. A group of workers with an interest in managing tends to assert itself and, what is more, to be willingly allowed to do so by the other workers. Quite aside from other sources of managerial hierarch-

ism, this development, which may or may not be inevitable, suggests that worker participation in decisionmaking is important to workers only to the extent that they do not have it and that when they have it they take it for granted. Decisionmaking participation may have scarcity value. But perhaps the problem needs to be restated. Perhaps the problem is not whether every worker participates in decisionmaking but that there is a system of worker participation and, moreover, that the strong tendency for a class structure to develop in United States industry be reversed. Managerial positions tend not to be filled by promotions from the ranks of nonmanagerial workers. Both managerial workers, who tend to consider themselves a class apart (which, because of the careers of their fathers, and increasingly their mothers, and their education, they culturally are), and workers, to whom their *job* is so important, view each other with distrust and antagonism, each attempting to retain, if not to enhance, whatever advantages they already have. If control over work, control per se, is the problem, then a new set of mores, a new industrial common law, must be evolved which converts what is now so much a zero-sum game into a positive-sum game. To say that such should be done is not to establish how it can be done or what the result will look like. As suggested earlier, the parties will have to work out the solutions, not have them laid down for them by experts.

XII.

Although it is an abstract and trans-systemic matter, the fundamental underlying institutional problem is the existence in all economies of the wage system in which some persons work for other persons. For all the rhetoric which accompanes socialist movements and socialist regimes, no socialist theorist or system has found a substitute for the wage system. Some substitute system, which it is beyond our competence to construct, no doubt will have its own generic problems. But it is important to understand that many of the problems addressed in this article arise or acquire their specific form due to the universal predominance of the wage system.

XIII.

On a more practical level, the IAM is concerned about technological displacement of its skilled membership. Other unions are concerned about management calls for wage cuts and other concessions. It may be that the more immediate threat to the union movement is a revitaliza-

tion of the efforts by management to deunionize, or further deunionize, United States industry.

XIV.

But there is another phenomenon which, it seems to us, transcends both technological displacement and deunionization so far as the future welfare of United States workers is concerned. This is the internationalization of the labor market to an extent never before realized and probably never before contemplated. With the growth of the multinational corporation, corporations no longer fully identify with their country of incorporation, with the country of citizenship of its officers, such that it is sort of second nature for them to produce in that country and hires its nationals. Multinational corporations now have a planetary horizon and will locate plants around the world using the same decisional criteria hitherto used within a country, a principal difference now being that foreign labor becomes increasingly substitutable for domestic labor, thus forming, or taking advantage of a newly formed, world labor market. The adjustment and displacement problems due to this are likely to swamp those due to technological innovation, although, of course, the two are not unrelated. One irony here, of course, is that direct and indirect government subsidization of corporate foreign investment has contributed to these developments. So much for the fiction and illusion that markets are immune from government action, for good or bad.

XV.

We conclude thus. Jobs as a means of access to income are critical for most persons. The consciousness of workers accordingly is focused on their jobs, not on something designatable as "careers." For those who organize production, whether they be capitalists, entrepreneurs, managers or commisars, the economy is largely a game in which they engage in moves and strategies in pursuit of more meaningful self-identity, prestige and status, income and wealth, and meritocratic career. The game performs a social function[s]: it enables the production of output with which people live and in the production of which they are themselves produced. If the economic game cannot be conducted in a way which provides jobs, income, and satisfaction for all, then it must be reckoned a failure. Those who have advantageous positions in that game risk more than they know or seem to realize. Considerations of

both humanity and expediency militate in favor of deliberate efforts to work out "better" solutions to the problems addressed in this article. Ideology and power will work only so far.

Epilogue

One of the principal themes of this article is that the impacts of technology are always mediated through social power, that it is power, not technology per se, that affects employment-unemployment. We would like to amplify the argument in the following manner.

First, there is an implicit assumption in the foregoing of a more or less conventional industrial labor force and industrial technology. We have not dealt with an important topic, namely, the way in which technology already has changed the United States economy and likely will continue to do so in the future. We mean the development of a service economy dominated by so-called high technology. A fundamental characteristic of this newly developing economy is the increased role of information, including its creation, manipulation, control and concentration. The power structure which controls technology and the operation of labor in the information society is likely to be quite different from that operative in the past industrial or machine society.

Second, this means that technology itself has an impact on the power structure and is not merely mediated through power. The technology of the future will place new and perhaps unique power in the hands of certain persons and groups. This may be particularly important if the culture of poverty operates to deprive the poor of the kinds of socialization necessary to acquire the new cognitive skills required for the information society.

Thus, on the one hand, power is capable of being reinforced by technology, while on the other, technology may change power structure. The latter is one of the unintended social impacts of technology.

Third, while we focus on a broad, aggregate notion of technology, we are aware, and indeed stress, that technology is not homogeneous in its social impacts. While there are imperative aspects of technology, there also are choice aspects of technology, that is, we often have a choice of the specific instrumentation or adoption of technology within a given aggregate technology. Thus there are certain combinations of technological characteristics (smaller scale, less complexity, less centralization or concentration of power, etcetera) which have "softer" social impacts, while other "hard" impacts come from the same technology with opposite characteristics.

Fourth, we reiterate our assumption of a continuation of the private enterprise-type economic system. We have focused our analysis on technology not to avoid the more ideologically loaded issues of power, stratification, and so on. Indeed, we have stressed power as both a dependent and independent variable, along with technology itself. We do not denigrate consideration of more fundamental change(s) in the economic system than we have discussed—although we continue to stress the great difficulties necessarily encountered in designing and predicting the outcomes of such major changes, including the role of wishful thinking.²

2. We wish to acknowledge the help of Denton Morrison in preparing this epilogue.

Were the Luddites Necessarily Wrong?: A Note on the Constitutionality of the "New Technology Bill of Rights"*

Arthur S. Miller**

There is a war on, but only one side is armed: this is the essence of the technology question today. On the one side is private capital, scientized and subsidized, mobile and global, and now heavily armed with military-spawned command, control, and communication technologies. Empowered by the second Industrial Revolution, capital is moving decisively now to enlarge and consolidate the social dominance it secured in the first. . . .

On the other side, those under assault hastily abandon the field for lack of an agenda, an arsenal or an army. Their own comprehension and critical abilities confounded by the cultural barrage, they take refuge in alternating strategies of appeasement and accommodation, denial and delusion, and reel in desperate disarray before this seemingly inexorable onslaught—which is known in polite circles as "technological change." °

—David F. Noble¹

I.

Unemployment is something we can all grasp and understand—and fear, too, for *Homo sapiens* has always been *Homo faber* as well. People are significant in the eyes of others not so much for what they *are* but for what they *do*. Meet someone for the first time at almost any cocktail party and the inevitable question soon pops out: "Where do you work?" or perhaps "What do you do?" In an ostensibly classless society, one's occupation or vocation solidifies his status in so-

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** Adjunct Professor of Law, Nova University Center for the Study of Law; Professor Emeritus of Law, George Washington University.

1. Noble, *Present Tense Technology*, 3 DEMOCRACY No. 2, at 8 (1983).

ciety. Work is the central factor of Western nations. Those who do not work, unless they have been favored by fortune with inherited wealth, are often scorned: They are called "welfare cheaters" or "bums." As Dr. Ralf Dahrendorf, Director of the London School of Economics, has observed: "Labor at the center of society means that every aspect of life must accommodate it—education, vacations, and retirement. In the labor society education conforms to the discipline and demands of work. Vacations serve as recovery periods, time to renew energies to return to work refreshed. For progressive labor societies, at least, retirement is a 'well earned rest after a lifetime of hard work.'"² It is beyond question that the United States has always been a "labor society."

The essential question posed by the International Association of Machinists (IAM's) "New Technology Bill of Rights" is how Americans should adapt to the sudden end of such a society and its transmutation into a society in which human labor has been largely eliminated. The IAM believes that adaptation should not be left to chance or to the vagaries of the "market." Theirs is a suggestion that affirmative governmental action be taken to deal with a new situation in the human condition. I will leave to others the question of the wisdom of the IAM proposal. In this brief commentary I pose and seek to answer the question of whether constitutional impediments exist that would bar the Bill of Rights of the IAM from going into effect.

The short answer to that question is "no"—there is nothing in the Constitution, as a document or as construed, that would invalidate what the IAM proposes. Let me explain. I begin with several assumptions. *First*, the new technologies of microprocessing and computers pose a clear and present danger to *Homo faber*. Mass man has become obsolete, superfluous to the needs of the emergent politico-economic order. Too many people are chasing too few jobs, a diminishing number of jobs. No one quite knows what to do with surplus people, although Professor Richard Rubenstein has developed some grim scenarios about what might happen.³ *Second*, it is, as Jacques Ellul has maintained,

2. Dahrendorf, *The End of the Labor Society*, WORLD PRESS REVIEW, March 1983, at 28. Dahrendorf also says, "There is no cure for today's unemployment." *Id.*

3. R. RUBENSTEIN, *THE AGE OF TRIAGE* (1983); Rubenstein, *The Elect and the Preterite*, 59 SOUNDINGS 357 (1976) (discussing "the rise of a mammoth, world-wide superfluous population that can no longer emigrate to underpopulated regions of the globe"). Rubenstein further comments:

[A]lthough Americans tend to regard technology as a means of solving problems, the problem of surplus people in contemporary America is as

"impossible to trust the spontaneous employment which men will make of the available technical means."⁴ The meaning is clear: positive action should be taken to ameliorate the adverse consequences of new technologies. *Third*, corrective action, should it come (which by no means is certain), can derive only from government—the federal government. That is so because a holistic approach is indispensable, one that encompasses the entire spectrum of man's position in nature and his relationships with his fellow humans. No other societal institution is capable even of considering, let alone undertaking, a program of comprehensive adaptation to what the scientists and technologists have wrought.

I do not propose to prove those assumptions. They are self-evident, and stated as givens in order to set the pattern for the ensuing brief discussion of validity of one of the consequences of technological change—the terminal sense of the loss of work itself by increasing numbers of Americans (and others throughout the world). My net conclusion is that the advent of the new technologies requires a thorough re-examination and reorganization of the political economy of the nation—indeed, of the world. The New Technology Bill of Rights is a proper step in that direction.

II.

The time has come for serious consideration to be given to the idea that constitutions should be directed toward the reasonable satisfaction of human needs and deserts, as well as merely establishing frameworks of government and setting forth a set of negative limitations on what government officers can do.⁵ What follows is in many respects a variation on a theme struck by Leon Duguit many years ago:⁶ "Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do." In recent de-

much the 'product' of technological rationality as are the automobile, the computer and the nuclear bomb. . . .The threat of permanent economic superfluity now confronts millions of American workers."

Id. at 358-59.

4. J. ELLUL, *The Technological Order*, in *THE TECHNOLOGICAL ORDER: PROCEEDINGS OF ENCYCLOPEDIA BRITANNICA CONFERENCE* 10, 25 (C. Stover ed. 1963).

5. This is the thesis of my book in progress, *supra* note *.

6. L. DUGUIT, *LAW IN THE MODERN STATE* 26 (H. Laski translation 1919).

cares, all three branches of the national government have risen in some degree to confront Duguit's challenge. Congress has enacted numerous statutes, the sum of which is to institutionalize the American version of the welfare state. The Executive has cooperated, in greater or lesser degree, by putting those legislative commands into operational reality. And the Supreme Court has constitutionalized those efforts to meet the "must do" part of Duguit's formulation. The requirement now is to face up to the challenge posed by the IAM.

Since enactment of the IAM proposal would constitute a structural change in government, a basic alteration in what I have elsewhere called the Political and the Economic Constitutions,⁷ purists might argue that if it is to come it should be by constitutional amendment. That, however, is not necessary. Amendment at best is a ponderous blunderbuss ill-suited to the requirements of a rapidly changing nation. That, it be noted, has been true since at least 1791, when the Bill of Rights was added to the Document drafted in 1787. Only the fourteenth amendment may be said to be of supreme importance. The other fifteen vary in significance from the repealed eighteenth to the nineteenth (voting rights for females); those of any consequence could have been put into law by innovative congressional action pursuant to section V of the fourteenth amendment.

We have become accustomed to and by and large agree with the notion of judicial exegesis of the Constitution. However much some may disagree with specific constitutional decisions by the Supreme Court, there can be no question that the Justices do sit as a continuous constitutional convention. They progressively update the fundamental law. Each generation of Americans writes its own constitution, having received a tacit delegation of powers from the framers to do so. (The Supreme Court also received a tacit delegation of powers from those who drafted the Document of 1787.) And the Constitution has always been relative to circumstances.⁸ It could scarcely be otherwise. Government and law are more reflective of social conditions than determinants of those conditions—at least historically. Law, including constitutional law, is less *a priori* than *a posteriori*.

The new technology poses constitutional problems. Can they be

7. Miller, *Toward a Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633 (1983).

8. See A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGING CONSTITUTION OF CONTROL passim* (1981); A. MILLER, *TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT* (1982).

met by means other than amendment? The answer can only be "yes," once it is perceived that the interpretation and development of the Constitution is emphatically not a judicial monopoly. The myth system is to the contrary: Under it, amendment or judicial exegesis are the only legitimate ways to alter the fundamental law. But under the operational code of the American constitutional order the Constitution is constantly in a state of becoming, altered not only by judicial decrees but by certain legislative and executive acts.

A number of statutes can be viewed as "quasi-constitutional in nature"; they sought to "clarify and define certain basic relationships among the branches of government."⁹ At least the following statutes fall into that category (although I see no reason to soften the label with a "quasi"): the Judiciary Act of 1789, the Sherman Antitrust Act, the statute establishing the Federal Reserve Board, the Budget and Accounting Act of 1921, the National Labor Relations Act of 1935, the Employment Act of 1946, the Civil Rights Act of 1964, the National Environmental Policy Act of 1969, the War Powers Resolution of 1973, and the Budget and Impoundment Control Act of 1974. There may be others, notably the National Security Act of 1947 and the National Emergencies Act, but that listing clearly demonstrates that Congress does indeed make constitutive decisions. Each of the statutes effected something of a structural change in the nature of American government; they delineate "structures and processes"¹⁰ rather than setting forth substantive policies.

As with Congress, so with the President: some of the Chief Executive's decisions or actions merit consideration as alteration of the Constitution. The ready example is the war-making power. Expressly vested in Congress by Article I, and thus under the myth system solely a legislative power, that notion was dealt a body blow by President Lincoln at the beginning of the Civil War.¹¹ Bit by bit since then—and even before then—the White House has become the center of effective control over the use of violence. That is so even though Congress has sought to retrieve some of its lost powers by the War Powers Resolution. Events since 1973 increasingly indicate that the Resolution is a

9. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 398 (10th ed. 1980).

10. *Id.* at 397.

11. For discussion, see C. ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* (1948); Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585, 595-97 (1980).

"paper tiger."¹² A constitutional shift of major proportions has taken place.

By no means are Congress and the President always at loggerheads. Many presidential actions, taken without express authority, get at least tacit congressional approval through appropriations and other means. Despite the conventional wisdom to the contrary, the norm between the branches is cooperation rather than conflict. Witness the manner in which Congress routinely appropriated funds for waging a presidential war in Vietnam. Witness also the establishment of the National Security Agency by a still secret executive order. In both instances, Congress did not dissent from presidential incursions on the legislative turf. There is a further lesson: In general, the Supreme Court goes along with congressional and executive constitutive decision-making. Examples are easily found: the *Prize Cases*, the *Jones & Laughlin* decision sustaining the National Labor Relations Act, and the brace of decisions upholding the Civil Rights Act.¹³ The Justices, as Professor Martin Shapiro has commented, are part of the governing coalition of the nation; and judicial independence exists more in the myth system than in the operational code.¹⁴

Enactment, therefore, of the IAM's proposed "New Technology Bill of Rights" would embed into the law a statute that would approach the dimension of a constitutional amendment. It would basically change the relationship of the workers to the "private" governments of the nation, principally the supercorporations. There is nothing in the proposal that would, under present doctrine, fail to pass constitutional muster. A series of Supreme Court decisions beginning with the *Gold Clause Cases*, passing through *Jones & Laughlin* and *Katzenbach v. McClung*, and extending to *United States v. Perez*¹⁵ is proof positive that existing law would validate what on first glance seems to be a revolutionary proposal by the IAM. Given the requisite political will to enact the proposal, it is wholly safe to forecast that the Supreme Court

12. For brief but insightful discussion, see Halperin, *Declaring War*, 9 FIRST PRINCIPLES, Sept.-Oct. 1983, at 12.

13. *Prize Cases*, 2 Black 635 (1863); *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

14. M. SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 34 (1981).

15. *Perez v. United States*, 402 U.S. 146 (1971); *Katzenbach*, 379 U.S. at 294; *Jones & Laughlin*, 301 U.S. at 1; *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240 (1935).

would not invalidate it. The persistent and unresolved problem, of course, is how to generate that political will.

No one expects either House of Congress to rush forward in full or even partial acceptance of the proposal. That it merits full consideration, and soon, should go without saying. Call it Luddism if one wishes, but the point is not that, but of determining who should bear, if indeed anyone should, the dreadful costs of adapting to a new economy. It cuts against the grain of the constitutional commitment to "equal justice under law" to say that displaced workers should alone shoulder the brunt of the loss of work itself.

III.

If it is assumed, as it should be, that Congress is far from likely to enact anything remotely similar to the IAM's proposal, does that end the matter? Not necessarily. But it would be enormously difficult to get something substantial done. Again, let me explain.

I set aside the notion that any one or even a combination of the several states could do the necessary. A company can play off one state against another and choose the one that maximizes the firm's interests. Furthermore, since under *Wickard v. Filburn* and *Katzenbach v. McClung*¹⁶ there is very little of economic importance that does not fall within the ambit of the federal government's power to govern commerce, the constitutional hurdle of unduly burdening interstate commerce would have to be surmounted. There is little reason to expect that the present-day Supreme Court, dominated as it is by corporation lawyers, would validate, say, an attempt by the state of Ohio to prevent runaway plants or to ensure that corporations, once established in the state, stay there. Profit maximization is the primary, if not the sole, goal of corporate management. An effort by any one state to enact the IAM proposal for companies doing business within that state would certainly engender hostile opposition from the entire business community. That hostility, in turn, is not likely to allow the state to prevail before the Supreme Court when lawsuits are brought, as surely they would. The pro-business attitude of today's Court is illustrated in, to cite only one decision, *First National Bank v. Bellotti*.¹⁷

16. *Katzenbach*, 379 U.S. at 294; *Wickard v. Filburn*, 317 U.S. 111 (1942).

17. 435 U.S. 765 (1978). See Miller, *On Politics, Democracy, and the First Amendment*, 38 WASH. & LEE L. REV. 21 (1981); Wright, *Money and the Pollution*

The ultimate need, if anything is going to be done, is for a great national debate about the pros and cons of the new technology to take place. How can it be started—and continued? “If there’s ever gonna be change in America, it’s gonna be cause every community in America’s ready for it and—boom! There’s gonna be a big tidal wave, and it’s just gonna crash down on Washington, and the people are finally gonna be heard.”¹⁸ That “tidal wave” could create the necessary political will in Congress. How can it be done? I venture, very tentatively and with full cognizance of the inherent difficulties in the proposition, that the Supreme Court could, at least in theory, provide the catalyst for stimulating such a debate.

I have argued elsewhere that the Supreme Court should strive to make decisions that maximize human dignity.¹⁹ Just as in *Brown v. Board of Education* the Warren Court struck a blow for the decent treatment of black Americans and in *Roe v. Wade* the Burger Court carried on that theme (holding that women should have the right to control their own bodies),²⁰ so it is here: The Court arguably can help in achieving a smoother transition to the new society that is fast becoming the norm. It, of course, would not be easy. But since both *Brown* and *Roe* can be read as official statements that precipitated great national debates (on race and abortion), it would not be a novel proposition for the Supreme Court to do something similar about the societal impact of technology. Two ways theoretically exist: first, the Court could attempt to impose affirmative duties on Congress and the President to take appropriate action concerning technology; and second, the corporation could be constitutionalized by updating the “state action” doctrine, followed by finding that workers—those willing and able—had a constitutional right to a job (in general, but not a specific job). I shall discuss each in turn, repeating at the outset the admonition that the ideas are proffered only tentatively.

of Politics: Is the First Amendment an Obstacle to Political Equality?, 82 COLUM. L. REV. 609 (1982).

18. S. TERKEL, AMERICAN DREAMS LOST AND FOUND 312 (1981) (quoting a community organizer). See generally S. BOWLES, D. GORDON, & T. WEISSKOPF, BEYOND THE WASTE LAND: A DEMOCRATIC ALTERNATIVE TO ECONOMIC DECLINE *passim* (1983).

19. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT ch. 11 (1982).

20. *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

A. Affirmative Duties on Government

I begin by acknowledging that for the Supreme Court to try to impose affirmative duties on Congress and the President to deal properly and effectively with the impact of new technologies is not a particularly promising avenue to take. But it is worth exploring, even though what immediately follows may be categorized as utopian thinking. There is a value in such thinking,²¹ if only to encourage people to elevate the level of their responses to new social conditions. The Supreme Court has long acted as what Judge J. Skelly Wright once termed "the conscience of a sovereign people." In recent decades—at least since *Brown v. Board of Education*—the courts have become targets of pressure groups, especially when the avowedly political branches of government refuse or fail to act and deal with what are perceived by segments of the citizenry as justified grievances.

Judicial interpretation (and enforcement) of affirmative duties of government is by no means novel. In race relations, legislative reapportionment, administration of the criminal law, and perhaps elsewhere,²² obligations have been placed on governmental officers to do something positive (as distinguished from refraining from not doing something—the time-honored ideal of constitutions as limitations on government). Add the fact that since *Cooper v. Aaron*,²³ and perhaps before, it is widely accepted that the logically impossible has been by some means known only to the Justices transmogrified into the possible—that a *general* principle can be inferred from *one* particular—and it is apparent that the Court has indeed become a *de facto* third (and perhaps highest) legislative chamber.

The argument, telescoped here,²⁴ derives from (perhaps antedates, although I know of no prior judicial statement) Chief Justice Charles

21. See W. GALSTON, *JUSTICE AND THE HUMAN GOOD* ch. 2 (198). Professor Galston maintains that utopian thought "performs three related political functions. First, it guides our deliberation. . . . Second, it justifies our actions. . . . Third, it serves as the basis for the evaluation of existing institutions and practices. . . . I am convinced that no political theory that seeks to be practical can dispense with it." *Id.* at 14-15.

22. See Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV., reprinted in A. MILLER, *SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION* ch. 5 (1979).

23. 358 U.S. 1 (1958); see Miller, *Constitutional Decisions as De Facto Class Actions: A Comment on the Implications of Cooper v. Aaron*, 58 U. DET. J. URB. L. 573 (1981).

24. For further discussion see A. MILLER, *supra* note 22, at chapters 4-5.

Evans Hughes' opinion in *West Coast Hotel v. Parrish*.²⁵ There, Hughes, dealing with the validity of a state's minimum wage legislation, said in part:

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment, governing the states, as the due process clause invoked in the Adkins case governed Congress. In each case the violation alleged by those attacking minimum wage legislation is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

With that language, particularly the concluding two sentences, Hughes changed the nature of liberty under the Constitution. "From being a limitation on legislative power," Professor Edward S. Corwin explained, "the due process clause became an actual instigation to legislation of a leveling character."²⁶ In effect, Hughes adopted without acknowledgment Thomas Hill Green's concept of positive freedom and of collective well-being. To Green, freedom meant "a positive power or capacity of doing or enjoying something worth doing or enjoying. . .in common with others." Freedom thus depends on the "help and security" given by others, and which a person helps to secure for others.²⁷ As Chief Justice Hughes put it, the liberty protected by due process is in a "social organization" that *requires* the protection of law against social evils.

Do the deleterious second-order consequences of new technolo-

25. 300 U.S. 391 (1937).

26. E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 161 (1948).

27. T. GREEN, *Lecture on Liberal Legislation and Freedom of Contract*, in 3 *WORKS OF THOMAS HILL GREEN* 365, 371 (R. Nettleship ed. 1900). See M. PHILLIPS, *THE DILEMMAS OF INDIVIDUALISM: STATUS, LIBERTY, AND AMERICAN CONSTITUTIONAL LAW passim* (1983).

gies—mainly unemployment—require “the protection of law?” The answer can only be “yes.” What can the Supreme Court contribute to the fulfillment of that requirement? As all know, the Justices have identified new rights outside of the constitutional text, both historically (as in liberty of contract),²⁸ and contemporaneously. Privacy is the ready example here; but there are others.²⁹ Can a similar right be created in the economic sphere? As we have seen, there is already an explicit governmental commitment to maximize employment and to further the economic well-being of Americans, seen, for example, in the Employment Act of 1946 and the Humphrey-Hawkins Act of 1978.

For the Supreme Court to do the necessary—to, that is, require political action “reasonable in relation to its subject”—would necessitate judicial innovation of a high level. The orthodox doctrine of judicial power under the Constitution requires that there be a justiciable controversy before courts can act. Some person, preferably someone out of work and wanting a job, would seek a court decree mandating that serious attention be accorded to employment security, followed by action which would affirm “every worker’s right to be employed with decent wages at some job or another—but not necessarily always at the same job.”³⁰ Or, in the plaintive language of a retired policeman and former marine, “I don’t think our system is all bad. . . . What I object to is, there’s no planning, I don’t care how much money it takes. They should put every guy that wants to work, to work.”³¹ The implication, of course, is that there should be a constitutional right to a job.

Merely stating such an idea does violence to the accepted norms of judicial behavior under the Constitution. But is the notion really so extreme? I think not, although I readily concede that there is little authority, as lawyers understand authority, to buttress it. To my knowledge, the only Justice of the Supreme Court who ever suggested as much is the late Justice William O. Douglas, who in 1955 asserted in a Supreme Court conference: “There is a constitutional right in this country for a citizen to have a job. There is a constitutional right to be a policeman or a lawyer.”³² (The second sentence was an attempted

28. *Lochnar v. New York*, 198 U.S. 45 (1905) is the *locus classicus*.

29. See M. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982).

30. S. BOWLES, D. GORDON, & T. WEISSKOPF, *supra* note 18, at 275.

31. Quoted in S. TERKEL, *AMERICAN DREAMS LOST AND FOUND* 232 (1981).

32. Quoted in B. SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 184 (1983).

refutation of the Holmes dictum, followed by his disciple Justice Frankfurter, that "there was no constitutional right to be a policeman.")³³ The basic principle that would have to be established (invented) is that the liberty protected by due process includes a right to a job; or perhaps more concretely, that the citizenry have property rights in jobs. Recognition of such a due process right, when viewed abstractly, is certainly no more extreme or revolutionary than the Supreme Court's unexplained flash of revelation in 1886 that a corporation—a disembodied economic entity—was a person within the meaning of the fourteenth amendment; or, for that matter, the 1973 similar revelation that a woman could have an abortion by invoking a right of privacy (which, incidentally, meant that the Justices refused to recognize that a fetus is a constitutional person). This is said, be it noted, not to take sides on either question, but simply to mention the obvious: that the Justices have found rights lurking somewhere in the interstices of the Constitution that could not possibly have been in the minds of those who wrote and those who ratified the Document and its amendments. The Bill of Rights and the Civil War amendments are statements of legally-concretized decency aimed at government and designed to canalize its relationships with the populace. Or as Justice Frankfurter observed in 1949: "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights."³⁴ So, I suggest it is here. Judicial exegesis, and expansion, of the Constitution is routine, as Justice Byron White stated in 1966 and Justice William Brennan in 1980.

Consider, for example, such cases as *Wesberry v. Sanders*, *Powell v. McCormack*, and *Buckley v. Valeo*,³⁵ each of which dealt with Congress as either actual or tacit defendant. Consider, too, the spate of recent decisions—the landmark case in *United States v. Nixon*³⁶—which are judicial interventions into the area of presidential power and discretion. Taken in their entirety, they evidence a growing

33. *Id.* The Holmes assertion may be found in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

34. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949).

35. *Buckley v. Valeo*, 424 U.S. 1 (1976); *Powell v. McCormack*, 395 U.S. 486 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

36. 418 U.S. 683 (1974).

willingness of the Supreme Court to intervene in both the national legislative and the executive processes. *Wesberry*, for example, told the House of Representatives (via the state governments) how Representatives had to be elected; and *Nixon* was an order to a sitting President to act as an ordinary citizen in criminal law matters. Add to *Nixon* the *Steel Seizure Case*,³⁷ which was really directed toward President Truman, and it can readily be seen that the Justices consider themselves to be a constituent part of government, equal in title and equal in dignity to the other branches. Judicial legislation has become a commonplace.

The sticking points in present context are, of course, the questions of justiciability and of enforcement. As for the former, the Court would have to take a mental leap and make what Frankfurter once called a "logically arbitrary but sociologically nonarbitrary" decision to find a constitutional case or controversy. Not that the method would be anything novel: Justiciability has long been characterized by judicial fiat. As in *Perkins v. Lukens Steel Co.*,³⁸ the "reasoning," such as it is, to justify finding or not finding justiciability (standing, etc.) usually is circular. That is accepted, with little opposition, as proper judicial behavior. If, then, the National Treasury Employees Union could succeed in a suit against President Nixon to enforce a statutory responsibility,³⁹ it would take no major extension of that principle for courts to find justiciable controversies in present context. The point, to be sure, is debatable and also controversial. After all, if the Court in the *Weber* case could determine the "spirit" of the relevant statute,⁴⁰ why could it not further determine that the spirit of the Employment and Humphrey-Hawkins Acts gave someone the requisite status to have their provisions carried into effect?

Enforcement is quite another matter. There is no present way that the Justices can do more than try to precipitate a great national debate that would, sooner or later, end in political action. The Justices, however, have long been America's first faculty of political economy, a vital national seminar in which the nation's values are often first debated and articulated. Could that "seminar" discussion be raised to the level

37. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

38. 310 U.S. 113 (1940).

39. *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

40. *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-06 (1979) (upholding affirmative action plan, despite statutory language prohibiting basing employment decisions on race).

of serious consideration of a constitutional right to a job? A tribunal that rose to the challenge of rectifying long-standing practices of racial discrimination, that created a constitutional right to an abortion, that eliminated the "rotten boroughs" of the nation, that stared down a sitting President, and that revamped the administration of the criminal law, surely is capable of dealing with the problem of how the economic rights of workers are to be determined under the Constitution.⁴¹

That, of course, is constitutional heresy. I do not expect ready agreement (in any degree) with such a proposal. But the Court has always been deeply immersed in politics. To Judge Spencer Roane of Virginia the decision of the Supreme Court in *Cohens v. Virginia*⁴² was heretical: "It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it, and from which even the upright and eminent judges are not exempt." To Roane, the *Cohens* decision was "most monstrous and unexampled."⁴³ It was heresy when I was in law school to assert that judicial action could be state action within the meaning of the fourteenth amendment, but the Court took the plunge in *Shelley v. Kraemer* and *Barrows v. Jackson*.⁴⁴ In like manner, Justice Hugo Black outraged Justice Felix Frankfurter when he maintained in *Adamson v. California* that the fourteenth amendment incorporated the Bill of Rights as a limitation on the states as well as the federal government.⁴⁵ As all know, Black's heresy has now become the conventional wisdom. Consider, furthermore, the firestorm of disapproval that erupted when the Court held in 1954 that black Americans were entitled to decent treatment in the public schools. *Roe v. Wade* received a similar reaction. The point is that the Supreme Court may have decided some issues that turned out to be "self-inflicted wounds";⁴⁶ but even so, it has emerged from the fray

41. See generally A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982). A contrary view may be found in Abraham, Book Review, 51 GEO. WASH. L. REV. 477 (1983); Rabkin, *The Charismatic Constitution*, THE PUBLIC INTEREST, Fall, 1983, at 142.

42. 19 U.S. (6 Wheat.) 264 (1821).

43. See C. WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 555 (1926).

44. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Barrows v. Jackson*, 346 U.S. 249 (1953).

45. 332 U.S. 46 (1947).

46. The term comes from C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928). Hughes listed the *Dred Scott* decision, *Dred Scott v. Sanford* 60 U.S. (19 How.) 393 (1857), the legal tender cases, *Knox v. Lee*, 79 U.S. (12 Wall.)

seemingly stronger than ever. (None of the cases listed immediately above falls into a category of a self-inflicted wound. *Dred Scott's Case*⁴⁷ is perhaps the chief example of such judicial behavior.)

The need, as has been suggested, is to generate a national debate on what should be done about the adverse second-order consequences of new technologies. My thought in this subsection is that the Supreme Court (courts generally) could play an important role in stimulating that debate. That, however, does not mean that the Justices could not act in another direction also. The focus of the next subsection concerns judicial recognition of the fact that corporations are "private" governments, the important actors of the Economic Constitution, and as such should have duties placed upon them.

B. Constitutionalizing the Corporations

That the United States is a corporate society is one of the commonplaces of the day. It has long been recognized that "voluntary private associations" play an important role in social affairs. I should like at this time to single out the business corporation—and of the corporations, the giant firms—for particular scrutiny. These companies dominate the private sector of the nation. Economically, that sector is a triad, consisting of the corporate economy (the giants), the small-business economy (much of which is also incorporated), and the nonprofits. Each part meshes with the others, but the giants—the supercorporations—are paramount, even though they are numerically much smaller. Those gigantic companies not only straddle the nation but usually operate throughout the world. They set the tone for and greatly influence the entire economy, government itself, and, indeed, all of society.

My thesis is that supercorporations are both economic entities and sociopolitical organizations that exist midway between natural persons and the state; as such, they should be perceived as "private" governments and held answerable to constitutional norms. They wield significant social and political power, but their constitutional legitimacy—their right or title to govern—has only a tenuous base. Rather

457 (1871), and the income tax case, *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) as "three notable instances [in which] the Court has suffered severely from self inflicted wounds." F. GRAHAM, *THE SELF-INFLICTED WOUND* (1970) claims that *Miranda v. Arizona*, 384 U.S. 436 (1966) was another such wound. He, contrary to *Hughes*, is not persuasive.

47. 60 U.S. (19 How.) 393 (1857).

like the way that Copernican astronomy superseded Ptolemaic cosmology, supercorporations have so eroded the premises of both classical economics and its political counterpart, liberal democracy, that new theories must be devised. Economists have yet to explain or to justify such massive conscious economic cooperation. So, too, with lawyers and political scientists: the corporation's place in the constitutional system is far from settled. A new political economy has emerged in the United States in this century, but ancient and outmoded ideas of politics and economics still abide. "We are living in tomorrow's world today, still using yesterday's ideas."⁴⁸

The preponderant social invention of the past century, supercorporations today occupy a place in society comparable in importance and influence to the Holy Roman Church in medieval Europe. With enormous assets, often running into tens of billions of dollars, they are concentrations of non-statist economic, and therefore of political, power not before known in human history. Corporate giants cannot avoid influencing human lives the world over on a scale similar to, and at times even dwarfing, public governments. Accordingly, Dr. Willis Harman maintains, "they face a demand that has historically been made only of government—that they assume responsibility for the welfare of those over whom they wield power."⁴⁹ The question in present context is whether that demand for corporate responsibility can be fulfilled through judicial action. Corporations have rights under the Constitution. Do they have concomitant duties? Corporations are constitutional persons. As such, do they have duties analogous to but not the same as those that natural persons have?

I answer those questions affirmatively. More specifically, I suggest that the Supreme Court could not only constitutionalize the corporation but could, following Chief Justice Hughes in the *Parrish* case, require that the giant firms develop policies that would include the welfare of the workers (as well as that of the stockholders). Again, I do not expect the present Court to leap to the challenge (save to shoot it down); but certainly the time has come to recognize the true nature of the supercorporations and do what is reasonably necessary about their undoubted power.

To bring the supercorporations within the ambit of the state action concept requires no major leap of doctrine. Indeed, the Supreme Court some years ago moved tentatively in that direction. But that movement

48. H. CLEVELAND, *THE MANAGEMENT OF SUSTAINABLE GROWTH* 15 (1979).

49. Harman, *The Coming Transformation*, *THE FUTURIST*, Fall 1977, at ____.

was halted with the appointment of the Nixonites to the High Bench, so that today it surely is accurate to say, with Charles Black, that state action is a "conceptual disaster area"; and with Christopher Stone that it is "now, more than ever, a shambles."⁵⁰ The reason for such conceptual disarray is not difficult to locate: the Constitution was drafted on the assumption that only two important juridical entities existed—government and the natural person—but during recent years the United States has moved into what James Q. Wilson has called "the bureaucratic state."⁵¹ Few judges know quite how to deal with the admitted economic power of disembodied economic entities. The state action concept may have made some sense during the nineteenth century, when society's groups were small and decentralized; the public-private distinction, Morton Horwitz asserts, was "a rough approximation of reality" in the last century.⁵² Today's world is different.

*Marsh v. Alabama*⁵³ is still in the United States Reports. It exists as a time bomb ticking away awaiting a time when lawyers and judges can perceive the obvious: that the corporations, as the principal exemplars of the Economic Constitution, are indeed private governments. There is no need to labor the point. The rise of the group and the emergence of a corporate, an organizational society, is plain beyond doubt. Constitutions, thus, should consider all—whether public or nominally private—who exercise significant power in the socio-political arena.

Over that hurdle, then the application of constitutional norms to purported private entities follows as a matter of course. The very concept of constitutionalism arose a few centuries ago as a means of combatting the overweening power of the political sovereign. Today we have both political *and* economic sovereigns, which are ever increasingly joined together in a form of corporatism, and the same type of thinking that contributed to the growth of constitutionalism should be applied to all organizations that wield significant social power. Profes-

50. Black, "State Action," *Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967). Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?* 130 U. PA. L. REV. 1441, 1484 n.156 (1982). See generally Phillips, *The Inevitable Incoherence of Modern State Action Doctrine* (1984) (forthcoming in a legal periodical).

51. Wilson, *The Rise of the Bureaucratic State*, THE PUBLIC INTEREST, Fall 1975, at 77.

52. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1428 (1982).

53. 326 U.S. 501 (1946).

or David Ewing of the Harvard Business School observed in 1977:⁵⁴

During the first two centuries of United States history, the trend was unmistakably to broaden the reach of the Constitution. Universal male suffrage, the abolition of slavery, bargaining rights for unions, female suffrage, the many extensions of due process to people under arrest or surveillance—these and many other events marked the ever-widening application of the Constitution. But the Constitution does not yet penetrate the organizational sector, the still-dark ghetto of American rights.

Ewing advocates that corporations (organizations, generally) be subjected to the limitations of an organizational bill of rights. He maintains that during America's third century, one of the hallmarks of constitutionalism "should be concern for the rights of employees."⁵⁵

What, however, are those rights? Professor Ewing's call is basically one of bringing due process—*procedural* due process—to the workplace. He makes a persuasive case. The question posed in this essay is whether that conception can be carried a step further—into the realm of *substantive* due process. A generation ago the Vice-President and General Counsel of the Ford Motor Company, William T. Gossett, maintained that corporate management "no longer represents exclusively the interests of stockholders. With the passage of time, it must develop a variety of devices and procedures to assure that its dealings with other groups are fair and just."⁵⁶ The other groups Gossett had in mind were employees, suppliers, dealers, customers and plant communities, "each of which has a separate claim on the corporation."⁵⁷

What, then, is "fair and just"? And how can corporate management be stimulated to do more than pursue the single-minded goal of profit? Gossett tells us that there are conflicts of interest among the various groups in the corporate community; and then goes on to make this relevant statement:⁵⁸

One of the most dramatic conflicts of interest revolves about

54. D. EWING, FREEDOM INSIDE THE ORGANIZATION: BRINGING CIVIL LIBERTIES TO THE WORKPLACE 217-18 (1977).

55. *Id.* at 218. See Miller, *A Modest Proposal for Helping to Tame the Corporate Beast*, 8 HOFSTRA L. REV. 79 (1979).

56. W. Gossett, *Corporate Citizenship* 178 (1957) (reprint from the John Randolph Tucker Lectures, 1953-1956, Washington & Lee University).

57. *Id.*

58. *Id.* at 187.

the decision of a large enterprise to move into a given community, or out of it—particularly the latter. There have been numerous instances where a single plant is the sole or major source of income for an entire community, and a callous attitude toward the effects of moving out could mean destruction for that community. The narrow interests of efficiency and profit-making for the stockholder might require such a move be made without delay. Yet the interests of local employees and the community might be so severely prejudiced that the corporation could not in good conscience move out without making every reasonable effort to mitigate the consequence of its going.

The problem, thus, is that of catching the conscience of the economic sovereigns—those who head the supercorporations. Courts are well suited to take on that task. The principle involved can be easily stated: Thou shalt not unreasonably harm members of the corporate community. Or put in affirmative terms: corporate management's decisions must take into consideration all segments of the corporate community, not merely one (the stockholders).

Here, of course, is a legal no-man's land. But the moral principle is clear, and can be translated into law by judicial decree. Consider, in this respect, what the well-known corporate lawyer, Adolf A. Berle, said in 1954:⁵⁹

Power to deal at will with other men's property and occupation, however absolute it may be as a matter of technical contract law, is subject to certain limitations. They still lie in the field of inchoate law: we are not yet able to cite explicit case and statute law clearly stating those limitations. We can only say that in this field a matrix of equity jurisdiction is beginning to appear.

I do not wish at this time to do more than call attention to Berle's idea of "inchoate law"; and then go on to suggest that in a few recent cases the Supreme Court has, for the public sector at least, rendered a series of decisions that evidence an emergent tendency—in Berle's language, an "inchoate" tendency—toward finding a right to a job. In *Elrod v. Burns*,⁶⁰ for example, the Court held that a newly elected Democratic sheriff could not fire some Republican employees simply because they

59. A. BERLE, *THE TWENTIETH-CENTURY CAPITALIST REVOLUTION* 82 (1954).

60. 427 U.S. 347 (1976).

were members of another political party. And in *Branti v. Finkel*,⁶¹ the Justices expanded the immunity of non-civil services employees from patronage dismissals. Said Justice John Paul Stevens: "it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government." In *Perry v. Sindermann*,⁶² a non-tenured college professor alleged an interest in continued employment, "though not secured by a formal contractual or tenure provision, was secured by a no less binding understanding fostered by the college administration."⁶³ Sindermann asserted that the "college had a de facto tenure program, and that he had tenure under that program," and offered to prove that he had "no less a 'property' interest in continued employment than a formally tenured teacher" at colleges with a tenure system.⁶⁴ Sindermann prevailed.⁶⁵

Are those decisions harbingers of things to come? That, of course, is possible but not probable. Other recent decisions, such as *Board of Regents v. Roth* and *Bishop v. Wood*,⁶⁶ point in a contrary direction. The most that can be said is that the issue has not really been settled. It is in flux. My position is that of Justice William Brennan in the *Bishop* case: "There is certainly a federal dimension to the definition of 'property' in the Federal Constitution,"⁶⁷ a sentiment that Justice Stevens, writing for the majority, called "remarkably innovative." Brennan believed that state discharges implicated a constitutionally protected liberty interest.

I believe that there is much to be said for the Brennan position. That it has not yet commanded a majority, save in such decisions as *Elrod*, *Branti*, and *Sindermann*, means that the Court is still searching for a doctrine (or doctrines) that would control public employment situations. If the *Elrod* principle is carried over into the private governments of the nation, then something approximating a constitutional right to a job would be in the making. Or if not a right to a job, at least a right that, once hired, a person must not be treated arbitrarily.

61. 445 U.S. 507 (1980).*Id.* at 519.

62. 408 U.S. 593 (1972).

63. *Id.* at 599.

64. *Id.* at 600.

65. *Id.* at 601.

66. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976). See generally Van Alstyne, *Cracks in "The New Property: Adjudicative Due Process in the Administrative State"*, 62 CORNELL L. REV. 445 (1977).

67. *Bishop*, 426 U.S. at 343.

IV.

A brief word by way of conclusion: The IAM proposal presents critical questions about the nature of the American political economy. I believe that Robert A. Dahl was correct when he recently observed that "the commitment to corporate capitalism needs to be reconsidered. Earlier, when the framers had discussed their fears about majorities that might invade the rights of minorities, more often than not they mentioned rights to property. Their reasoned justification of a right to property, if they held one, would no doubt have been Lockean. Yet the Lockean justification makes no sense. . . when it is applied to the large modern business corporation."⁶⁸ Historical capitalism is dying; of that there can be little doubt. What will replace it is by no means certain at this time. Capitalism today is ever increasingly collectivist in nature, which means that its economic decisions are made politically. It is not a stable system, as the IAM proposal evidences. For that reason, and perhaps for others, many nations today are moving toward nationalization. State-owned companies are on the rise. Professors Monsen and Walters tell us, throughout Western Europe.⁶⁹ "European governments," they show, "now have a direct ownership stake in over half of Europe's largest companies." Those firms, plus the more market-oriented enterprises in the East, pose a direct challenge to American industry. How United States firms will react is one of the crucial politico-economic—that is, constitutional—questions of the day. The rise of the new economies will have to be met, in some form or another, by the United States. I believe that the consequence will be a growing form of an indigenous type of corporatism.⁷⁰ If so, then the public-private distinction is on its way out. And it becomes all the more important that proposals such as the "New Technology Bill of Rights" be given comprehensive and respectful attention by those who wield effective power in America.

Finally: I do not wish to be placed in the position of using constitu-

68. Dahl, *On Removing Certain Impediments to Democracy in the United States*, in *BEYOND THE WELFARE STATE*, 71, 90 (I. Howe ed. 1982).

69. R. MONSEN & K. WALTERS, *NATIONALIZED COMPANIES: A THREAT TO AMERICAN BUSINESS* (1983).

70. See A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* *passim* (1976); Miller, *Toward a Definition of "The" Constitution*, 8 U. DAYTON L. REV. 633, 691-700 (1983).

tional arguments as a form of “desperate legal acrobatics.”⁷¹ Surely, however, the relationship of the populace—in present context, that of the workers—to the public *and* private governments of the nation is an important constitutional question. (Can someone name another that is more important?) If the IAM proposal necessitates the complete re-examination of the political economy of the nation, then such a scrutiny is long overdue. Furthermore, as Chief Justice Charles Evans Hughes once observed, “Behind the words of the constitutional provisions are postulates which limit and control.”⁷² One such postulate, I suggest, is a surpassingly important human need: the need to be needed. If the Constitution should, as has been suggested above, evolve into one that fulfills human needs and human deserts within environmental constraints, then the requirements of *Homo faber* should be recognized and realized. Government, I maintain, has no other purpose than to make every reasonable effort to see that human needs and deserts are in fact satisfied. More specifically, if “our constitutional system rests on a particular moral theory, that men have moral rights against the state,”⁷³ I maintain that high among those “moral rights” is that of a constitutional right to a job.

71. Levinson, Book Review, 57 TEX. L. REV. 847, 858 (1979).

72. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1943).

73. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 147 (1977).

Technology, Unemployment and Genocide

Richard L. Rubenstein*

The impact of technology on the processes of production affects every aspect of American life, and most especially the long-range employment prospects of the American worker. Unfortunately, this development is seldom given the consideration it deserves by political decisionmakers. Whether or not we regard as practical the proposals incorporated into the workers' Bill of Rights proposed by the International Association of Machinists, it is the merit of the proposal to focus our attention on the need for a coherent national response to the problem of technologically-induced mass unemployment. Given the limitations of the current symposium, it is obviously impossible to deal with every aspect of the question. I therefore propose to limit myself primarily to a consideration of the relationship between unemployment and genocide.

I take genocide to mean the calculated and premeditated extermination of a target population on the initiative of political authorities. Mass unemployment and genocide can be seen as related phenomena. Both are consequences of the rationalization of the economy and society which has characterized the modern period. Put differently, both are outcomes of the modernization process. Briefly stated, it is my hypothesis that the worldwide transformation of the traditional, subsistence agrarian economies to economies in which all forms of production have been progressively rationalized has resulted in the rise of mass populations entirely redundant to any conceivable production process and the bureaucratic and technological structures required for their elimination.

A program of mass extermination can be seen as a state-sponsored program of population elimination. Genocide is by no means the only method available to public authorities to implement such a program. It is, however, the most radical. Official encouragement of mass emigration, colonization schemes, imperialist ventures, mass expulsion, and apartheid policies have served as alternative methods employed by state authorities to eliminate an unwanted target population. Moreover, a

* Robert O. Lawton Distinguished Professor of Religion, Florida State University; President, The Washington Institute for Values in Public Policy, Washington, D.C.

population targeted for elimination need not itself be vocationally redundant as long as its riddance is perceived to be a benefit by political decisionmakers. For example, a scarcity of job slots can easily lead to conflict concerning the distribution of available work. In the past, some governments have actively encouraged the departure of employed members of a minority group so that unemployed members of the dominant majority might secure the newly-vacated positions. In those cases in which the targeted minority was unwilling or unable to emigrate, the governments in question have often resorted to harsher methods of population elimination. This was the case in Poland in the 1930s where the Polish government saw the elimination of Poland's 3.5 million Jews, all of whom were publicly declared to be "surplus," as a necessary measure for making jobs available for Poland's woefully underemployed non-Jewish population.¹

Similarly, during Germany's post-World-War II *Wirtschaftswunder*, or economic miracle, millions of foreign workers from Spain, Italy, Yugoslavia and Turkey were invited to migrate to Germany as *Gastarbeiter* or guest workers to fill the jobs Germans were unwilling or unable to take. Today, the German economy can no longer absorb the foreign workers and considerable agitation has developed for sending these workers and their families back to their native countries. Because of the still-fresh memories of Auschwitz, no responsible German official has actively supported the compulsory expulsion of the *Gastarbeiter*. Nevertheless, there is widespread sentiment in Germany that somehow the unwanted and unneeded foreigners must be encouraged to depart.² While this development may seem unrelated to the problem of genocide, the connection becomes clearer if we keep in mind that official encouragement of mass emigration and genocide have the same objective, namely the elimination of a target population, although there is obviously a vast difference in the method of implementation. Unfortunately, where public authorities perceive the objective to be a matter of necessity, failure to achieve the objective by relatively mild methods may lead to the employment of radical methods, especially in a period of acute social stress.

Nor have public authorities always exempted members of the majority ethnic group from their programs of population elimination when

1. This problem is discussed by CELIA S. HELLER, *ON THE EDGE OF DESTRUCTION: JEWS OF POLAND BETWEEN TWO WORLD WARS* (1977).

2. See John Nielsen, "Racism on the Rise," *Time*, Asian Edition, December 12, 1983.

the targeted group was perceived as redundant to the community's labor needs. Thus, during the nineteenth century large numbers of Englishmen, Italians and Germans were encouraged to emigrate by their own governments. With the modernization of both the agricultural and industrial sectors of the European economy, governments preferred to encourage emigration rather than face the social costs of a large, discontent, indigenous unemployed population. In many instances, authorities gave paupers funds sufficient to make the journey to North America but not to return.

A civilization that loses as many people through emigration as Europe did between the end of the Napoleonic Wars and the beginning of World War I is a civilization in crisis. The statistics give us some idea of the dimensions of the crisis: between 1875 and 1880 as Europe was in the process of rapid industrialization, approximately 280,000 persons emigrated annually. The figure increased to 685,000 annually between 1880 and 1885; between 1885 and 1890 the annual average was 730,000. In the peak year of 1910, two million people left Europe! Nevertheless, the crisis of modernization and industrialization was somewhat disguised by the fact that there were vast areas available for European settlement and peoples of European origin enjoyed an absolute technological superiority over non-European peoples well into the twentieth century. This enabled Europe's surplus human beings: (1) to expand over very large areas of the earth with only minimal resistance from the indigenous populations; (2) exploitatively to dominate most European peoples, utilizing their labor and natural resources under conditions extremely favorable to the Europeans; (3) to create and maintain an industrial civilization in which most non-Europeans were customers rather than competitors. These conditions permitted a far greater expansion of the economies of the European peoples than would otherwise have been the case had all of the peoples of the world modernized simultaneously. Europe's technological headstart also permitted the absorption of more Europeans in the work force than would have otherwise been the case. Nevertheless, in spite of the never-to-be repeated advantages enjoyed by the Europeans, the continent was unable to escape the horrendous social dislocations of World Wars I and II, the Russian Revolution, the Spanish Civil War, Italian Fascism and National Socialism.

Unfortunately, the problem of the mass population redundancy that plagued Europe in the nineteenth and twentieth centuries is now besetting most of the developing and developed nations alike. At present, the United States is engaged in a great national debate concern-

ing the nature of our response to the political upheavals taking place in Central America. There is general agreement that the roots of the political upheavals are to be found in the population explosion and the region's high unemployment.³ Indeed, the report of the Kissinger Commission discusses this issue under the sub-title, "Modernization and Poverty." Similarly, millions of Mexicans, rendered unemployed by the rationalization of Mexican agriculture and Mexico's population explosion have attempted to enter the United States in search of any kind of work. In so doing, they are acting as have other immigrants throughout the history of the United States.

Nevertheless, both the United States and the world at large are very different than what they were even a decade ago. Perhaps the most important single new fact is that the peoples of European origin are no longer technologically superior to non-Europeans, especially the peoples of the Orient. In addition to Japan; South Korea, Taiwan, Singapore, and Hong Kong have demonstrated a phenomenal capacity to compete with the West in developing a type of technological civilization originally endogenic to the west and exogenic to the Orient.⁴ Moreover, while Americans reflect on how to respond to Japanese industrial competition, they are almost completely unaware of the imminent challenge of South Korean competition. Within a very short time South Korea is likely to be one of the world's most important technological producers. This development is bound to have profound repercussions on the American economy. Whatever the outcome of the ongoing technological transformation of Asia, a transformation which is likely to benefit the United States as a Pacific Ocean power far more than Europe, it is obvious that societies of European origin can no longer solve the problem of surplus people by exporting them. This is especially true of the United States which was for many decades the solution rather than the problem.

Ironically, Adolf Hitler was one of the first European political leaders who understood that the problem of surplus people could not be solved by emigration. He states this with special clarity in a book

3. THE WASHINGTON INSTITUTE FOR VALUES IN PUBLIC POLICY, CENTRAL AMERICA IN CRISIS: A PROGRAM FOR ACTION; *see also* REPORT OF THE NATIONAL BIPARTISAN COMMISSION ON CENTRAL AMERICA 22-25 (January 1984).

4. *See* Roderick MacFarquar, "The Challenge of Post-Confucian Asia," *The Economist*, February 9, 1980; R. HOFHEINZ, JR., & A. CALDER, *THE EAST ASIA EDGE* (1981).

known in English as *Hitler's Secret Book*.⁵ As we know, his "solution" included genocide and wars of enslavement and extermination. Instead of exporting its surplus population to the New World where their demographic strength would be lost to the fatherland, Hitler proposed that Germany create a *Lebensraum*, a living space, on her eastern frontier by conquering and uprooting the indigenous Slavs. As we know, in the case of the Jews of Germany and Eastern Europe, they were exterminated outright. By vastly enlarging her territory, Germany could find a place for her surplus millions within her own borders. Hitler was determined that, whoever might be rendered redundant by advances in technology and population growth, it would not be healthy Germans.

A number of writers on the problems of black people have also understood the connection between unemployment and genocide. Sidney Wilhelm and Samuel Yette have suggested that at some time in the future an attempt might be made to exterminate America's unemployed blacks.⁶ Both writers have been accused of extreme paranoia. Such accusations miss the point. The problem of surplus people can be handled with relative ease in times of prosperity. The apprehensions expressed by these writers concern what might happen in a period of acute scarcity and social stress.

Let us consider the kind of scenario in which mass population elimination might become a tempting policy option. In a period of acute and seemingly insoluble hardship a future administration might conclude that a mass surplus population no longer serves the national interest even as a reserve labor force. As the micro-processor revolution accelerates, the value of unskilled labor is bound to diminish significantly in any event. If such a time of crisis ever comes, the problem of surplus people will admit of only a limited number of solutions. These boil down to redistribution of resources and work opportunities or some form of population elimination. The latter could involve the repatriation of "illegal" immigrants, whose number will have grown as the economic crisis worsens, mass warfare, and in the most extreme cases, actual extermination. As we have seen, in the past, governments have preferred to eliminate people through emigration rather than by the redistribution of resources. Absent the opportunities for emigration available to Europe in the nineteenth century, an American population

5. A. HITLER, *HITLER'S SECRET BOOK* (1983) (especially pages 13-25 and 70-74).

6. See S. WILHELM, *WHO NEEDS THE NEGRO?* (1971); and F. YETTE, *THE CHOICE: THE ISSUE OF BLACK SURVIVAL IN AMERICA* (1971).

elimination program, if ever initiated, would have fewer humane options. It would also be even less inhibited by any residual sense of community in view of the class, racial, ethnic, and ideological divisions, as well as the depersonalized instrumental business and bureaucratic ethos that pervades American public life. One might also note that native American Indians can, with justice, claim that there has already been an American population elimination program of major proportions.

It is this author's very tentative conviction that an American population elimination program would not employ large-scale death camps as its major instrument as did the National Socialists. Mass warfare would appear to be a more tempting policy option. Even the National Socialists and the Turks did not resort to outright extermination programs until they found themselves in the midst of a major war. In a severe crisis, desperate political leaders might first be tempted to lead the nation into war, perhaps only partly aware that they were more interested in destroying the enemy than in reducing their own surplus people. Elsewhere, I have argued that at some level the British, French, and German high commands in World War I intuitively understood that millions of their own soldiers had been rendered superfluous by industrial civilization and that such monstrous battles as Verdun and the Second Battle of the Somme, in which a total of 2.3 million men were lost by both sides, can be understood, to some extent, as exercises in state-sponsored programs of population elimination.⁷

Moreover, after a major war the reconstruction period can lead to a relatively prolonged period of prosperity and full employment. This was undoubtedly the case between the early 1950s and 1974. Thus, war might be perceived by policymakers as having the double "advantage" of eliminating surplus people and, by its very destructiveness, paving the way for a post-war boom of long duration. There is, of course, a major constraint on the use of warfare to eliminate surplus people, namely, the unpredictable extent of nuclear damage. Unfortunately, even that constraint might be overlooked by public authorities faced with a desperate and apparently insoluble social crisis. Perhaps the recent resurgence of a mass peace movement in the advanced industrial nations reflects a widespread intuition by millions of human beings of their potential superfluity and expendability in a period of rising unemployment.

There is much more that can and must be said on the issue of

7. See R. L. RUBENSTEIN, *THE CUNNING OF HISTORY: MASS DEATH AND THE AMERICAN FUTURE* (1975).

unemployment and genocide. I have endeavored to deal with the subject in greater depth elsewhere.⁸ In the present context, the urgency of the situation which has prompted the International Association of Machinists to propose a workers' Bill of Rights should be apparent. The merit of the proposal is that it addresses the very real crisis facing skilled American workers, especially in industries where microprocessor technology is likely to displace the vast majority of even the most skilled workers. Its weakness lies in its overly narrow focus on the American scene. In December 1983 this writer inspected the machine tool factories of Tong-il Industry Ltd. in Changwon, Korea. I saw a huge factory complex turning out computerized lathes, universal cylindrical grinding machines, vertical/horizontal milling machines and other machine tools. I also saw a new factory in which the tools could be manufactured by robots. Every computerized advance in manufacturing technique was being employed. The products were state of the art. They will undoubtedly compete with American products in the world market with every promise of a high degree of success.

There is simply no way that American manufacturers of comparable products can remain in business unless they automate to the same degree as the Koreans and the Japanese. Moreover, there is no way that state or Federal authorities can tax or otherwise penalize American manufacturers who automate, as the workers' Bill of Rights proposes. Indeed, under the best of circumstances, American manufacturers are going to find it difficult to remain in business unless they employ every conceivable labor-saving device available. Nor is there any certainty that there will be "labor cost savings" or "gains resulting from the new technology" to be shared with the workers, as the workers' Bill of Rights implies. On the contrary, given the cost advantage of the Japanese and the Koreans, whatever savings result from automation will have to be used to keep the American product competitive on the world market. Moreover, even if displaced workers are given training, it is by no means certain that there will be jobs in which to place them.

In short, there is an air of economic unrealism about the proposed workers' Bill of Rights. Nevertheless, the problems which moved the Machinist union to make the proposal are real and must be dealt with by government, capital and labor acting in concert if we are to survive as a responsible and humane society. Our fundamental problem is how

8. See R. L. RUBENSTEIN, *THE AGE OF TRIAGE: FEAR AND HOPE IN AN OVERCROWDED WORLD* (1983).

we can turn our productivity into a social asset capable of enriching both the material and spiritual aspects of our society. If we ignore the problem, we will in effect continue a line of development that has the effect of rendering millions of our fellow citizens vocationally redundant and socially useless.

I have only begun to formulate what I believe to be the indispensable preconditions for meeting the crisis. I can therefore only offer the briefest suggestion of what, in my opinion, may be required: (1) In order to remain competitive in the world market, especially in the face of ever more sophisticated competition from the Orient, American industry will have no choice but to utilize state-of-the-art automation to the full extent of its availability and economic feasibility. (2) Alternative forms of meaningful activity, such as university study to the graduate and post-doctoral level for an ever-expanding student population of all age groups, must be fully funded by public authorities. No other institution has demonstrated the ability to provide large masses of people with an alternative to the labor market which is as meaningful as that offered by American colleges and universities. Age ought to be no barrier to participation in any degree program. (3) American primary education must become at least as competent as that of Japan, Korea, Taiwan and Singapore in imparting the tools necessary for work and leisure in a high-tech era. (4) As manufacturing processes become ever less labor-dependent, plans ought to be devised for the sharing of available work opportunities by a maximum number of workers even if this results in a significant reduction in the length of the normal work week. (5) Immigration laws should be stringently enforced. It will be difficult enough for American society to cope with the problems of its own citizens without being compelled to cope with those of its neighbors. Nevertheless, some provision must be made for the continued recruitment of talented foreigners for American industry and education. (6) As the value of labor inevitably diminishes with the continued use of sophisticated technology, some means of permitting labor to share in the fruits of capital must be devised. Put differently, productivity must enhance rather than diminish the well-being of the average citizen.

These ideas are obviously tentative and incomplete. Indeed, they may be as unrealistic as the workers' Bill of Rights. What is important is that serious attention be given *now* to the problem of technology and unemployment. Failure to do so will lead sooner or later to a catastrophic situation in which the worst-possible-case scenario I have outlined above is likely to be viewed by policymakers as the best possible case. Lest the scenarios seem extreme, I must remind my readers that

they have already taken place in this bloodiest of all human centuries. What we seek to avoid is not a first instance of monumental tragedy but a repetition. It is for that reason that I welcome the Machinists' proposal. It is as good a starting point as any.

The Case of the Burnside Foundry*

Mary Gibson**

In this article we explore the right to refuse an unsafe assignment. We argue that an effective right to refuse is a necessary condition for informed consent to workplace hazards. Noting that the right to refuse, as well as any other rights that workers have by virtue of being workers, is empty if one does not have a job, we go on to explore the claim that a person has a right to a job. We conclude by observing that the same considerations which support the claim that they have a right not just to any job, however demeaning, meaningless, routine, or boring, but to useful and challenging work.

The Burnside Foundry in South Chicago:

February 14: Six workers are sent home by the company for refusing to work on the furnace floor, where pools of water up to three inches deep have been collecting in tapping pits.

February 15: The six men return to work. They know that if any of the 3200 degree molten metal being poured from the furnace into a ladle were to make contact with the water on the floor, a tremendous explosion would rock the foundry. The company says that it will remove the water from the floor.

February 16: Molten steel is being poured from the furnace into the ladle. The ladle jams. Two maintenance men, Steve Mihalik and Lawrence Stiff, go to work on the jammed ladle. Neither has any protective clothing, face shield, or flame retardant equipment which the company is required to provide.

Suddenly the ladle unjams. The hot liquid metal spills over the side. In the tapping pit below, the three inches of water there is instantly turned into a mass of steam, expanding in volume more than one thousand times. Massive energy is released, spraying hot metal in all directions, and Mihalik, Stiff, and 18 other workers in

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** B.A., Hunter College of the City University of New York; Ph.D. (Philosophy), Princeton University; Associate Professor of Philosophy, Rutgers University.

the area suffer severe burns over their bodies.

The evening of February 16: Steve Mihalik dies from . . . burns over 90 percent of his body.

February 25: Lawrence Stiff dies, and shortly afterwards fellow steelworkers Albert Chisholm, Jr. and Lewis O'Daniel also die. Stiff, Chisholm and O'Daniel are black.

In the aftermath of the explosion at Burnside, Occupational Safety and Health Administration (OSHA) officials conducted a two-week investigation and then announced their findings. They found that the company had not taken adequate precautions to prevent the explosion of February 16th and levied a fine of \$42,000 and ordered the company not to reopen for production until all violations are corrected.

David Marshall, secretary of the grievance committee of Local 1719, pointed out that the union has filed more than 50 grievances in the past year on safety related problems, and that a year ago two men were badly burned when the ladle overturned due to defective bearings. Two years ago, Marshall added, a worker was decapitated at Burnside when a moving crane whose operator could not see the man, swung it against him.

"The safety Committee has to have more power to deal with the company at the shop level," said Marshall. "We should be able to file charges, levy fines against the company when they violate the safety of the men, and set a time limit of eight hours for the company to correct unsafe working conditions, with the men being paid their regular hourly rate of pay while they wait for the company to make the necessary changes."

James Balanoff, director of District 31, USWA, labeled the deaths at Burnside "murder," and pledged that "if I do nothing else, I am going to bring these companies into the 20th century."

Balanoff said there have been nine deaths in District 31 plants in the past year, with eight of them in the South Chicago area.

Workers in the steel mills, coal mines and other industries are demanding stronger contract clauses on safety and health; especially protection for workers who refuse to work under unsafe conditions. In addition, many workers are asking why management officials who are responsible for overseeing the carrying out of safe working conditions, should not be held liable when workers suffer death or injury due to unsafe jobs. . . . [from an article by Herb Kaye, *Daily World*, March 15, 1979]

Steel

In addition to burns, explosions, and myriad other accidents, steel foundry workers may be exposed to silica dust, carbon monoxide, resins such as phenol formaldehyde, hydrocarbon, coal tar pitch, lead (for leaded steel), galvanizing chemicals, noise and heat stress (Scott, 1974 41). Let us look briefly at the effects of a few of these hazards.

Silica dust causes silicosis, a scarring of the lungs which causes them to become progressively inelastic, making it more and more difficult to breathe, and preventing passage of oxygen to the blood. The scars may join together and form larger scars, which may occupy the entire lung. This process, called progressive massive fibrosis, is often accompanied by increased susceptibility to tuberculosis and other lung infections. The heart, due to the strain of pumping blood through inelastic lungs, becomes enlarged and fails to pump effectively (Stellman and Daum, 1973, 167-69).

According to Rachel Scott, "Three foundries in Muskegon, Michigan, employing thirty-five hundred to four thousand men, have for years produced about four hundred new cases of silicosis annually. Ten percent of the entire workforce, in other words, was disabled every year" (Scott, 1974, 41).

Carbon monoxide is a colorless and odorless gas so one can be exposed with no way of knowing it. It attaches and binds itself chemically to hemoglobin, the blood component that normally carries oxygen in the blood. If body tissues do not receive a constant supply of oxygen, they stop functioning and die. The brain is most susceptible, and early symptoms of carbon monoxide poisoning are the results of brain misfunction due to lack of oxygen. Acute symptoms: headache, then throbbing headache, reddening of the skin, dizziness, dimness of vision, nausea, vomiting, and at higher concentrations, coma, suffocation, and death. Long term, low dose effects: headaches, dizziness, decreased hearing, visual disturbances, personality changes seizures, psychosis, palpitations of the heart with abnormal rhythms, loss of appetite, nausea and vomiting (Stellman and Daum, 1973, 164-65).

Coal tar pitch causes dermatitis accompanied by pains, swelling, rash, and blisters, skin cancer, including scrotal cancer, lung irritation, and may occasionally cause pulmonary edema (Stellman and Daum, 1973, 193-94).

In the coke ovens powdered coal is converted into coke, a hard, dense fuel that is used to charge the steel furnaces. This is the dirtiest workplace in a foundry. Coke oven workers risk excessive exposure to

coal tars. They develop cancer of the scrotum at a rate five times that of the general population. They also develop cancers of the lung, bladder and kidneys at rates greater than the general population (Scott, 1974, 45). A study begun in 1962 and published by the U.S. Department of Labor in 1974 examined the health records of 100,000 steelworkers at 17 plants. Among its findings were the following: Coke workers as a group are two and one-half times more likely to die of lung cancer than steelworkers who do not work in coke plants; after five years on the job in the coke plant the lung cancer rate rises to three and one-half times the normal rate; for workers on top of the coke batteries with five years on the job, the death rate is ten times higher than normal (Spencer, 1977, 224; Scott, 1974, 45-46).

Considering these facts, it is important to note that while the overall percentage of blacks in the workforce in basic steel is 22 percent, in the coke oven area it is 90 percent. Of all black coke oven workers, 18 percent were in full-time topside jobs, compared to 3.4 percent of white coke workers (*Safer Times*, July/August, 1978, 3).

Heat stress takes various forms, depending on the conditions of exposure, degree of activity, and individual body response. There are four types of acute reaction: heat stroke, heat exhaustion, heat shock, and heat fatigue.

Heat stroke involves a sharp rise in body temperature accompanied by confusion, angry behavior, delirium, and even convulsions. The skin is warm and dry, and there is no sweating. It can be fatal.

In *heat exhaustion*, or heat fainting, the victim feels tired, giddy, and nauseated, and may feel chilly. There may be rapid, shallow breathing, a weak, slow pulse, and moist, clammy, cold, pale, or even bluish skin. The blood pressure is low because the blood vessels all over the body are dilated, and there is not enough blood to circulate through these enlarged vessels.

Heat shock is a form of heat exhaustion common in healthy persons working in a hot environment to which they have not become acclimatized. The body loses excessive amounts of fluid and/or salt due to inefficient sweating. There may be insufficient fluid in the body to maintain circulation to all organs. Lack of salt may result in heat cramps, weakness, nausea, headache, fatigue, and dizziness. The victim becomes irritable and suffers muscular weakness.

Heat fatigue is characterized by the lassitude, irritability, and easy fatiguability that are familiar hot weather sensations. "A person with heat fatigue does not work as well, produces less, makes more mistakes, and has more accidents. The feelings get worse if the fatigue

is not relieved by rest. Heat fatigue may affect a person's personal relations on the job and at home as well. Thus in addition to paying a physical price for working in a hot environment, a worker will pay an emotional price" (Stellman and Daum, 1973, 128).

Prolonged exposure to a hot environment results in a process called acclimatization. The process takes from four to six days and is most effective in young people; older people never acclimatize to heat completely. Changes occur in the circulatory system and in the volume and composition of sweat. Dilation of the small blood vessels of the skin allows the heat of the blood to be transferred through the skin back to the environment. This increases the work load for the heart since blood must be pumped through a larger total circulation area. To compensate for this increased work load, the blood vessels to the liver, stomach, and intestines constrict. The liver is sometimes damaged by lack of oxygen resulting from prolonged active work in a hot environment (Stellman and Daum, 1973, 123-28).

Discussion

Let us begin this discussion by picking up the thread of an issue that links the first three chapters and, less directly, the fourth as well. In the first chapter we raised the question whether the Cyanamid case could be called a case of sterilization without informed consent, due to lack of genuine consent. In the second chapter we raised the same question concerning the Oxy case, this time due to lack of information. We went on to explore the more general right of informed consent to risks and hazards one is exposed to on the job, and its implications for the right to know. In this chapter we shall look at the implications of the right of informed consent to risks or hazards on the job for the issue of the right of workers to refuse an unsafe work assignment.

It is not clear from the report of the Burnside Foundry case whether any of the workers who were sent home on February 14th for refusing their assignments were among those killed or injured on the 16th. It seems likely that some of them were the same, but that is not really important. What is important is whether the workers had a right to refuse to be subjected to a risk of what they believed to be a high probability of serious injury or death, and if so, what the bases of that right are, and what the right entails.

Workers have been dismissed (and told they had *quit*), fired for insubordination, suspended without pay, sent home without pay for the remainder of a shift and told not to return until ready to do the job,

had disciplinary letters placed in their files (which can later be used to justify firing, not promoting, etc., on the grounds that a person is uncooperative or a troublemaker)—all for refusing assignments they believed to be unsafe. The arguments to justify these responses on the part of employers seem to be one or more of the following:

1. The employee accepted the job. This is part of the job. Therefore, the employee should do this or (a) be considered to have quit, or (b) be fired for insubordination for refusing to do the job he or she was hired to do.¹
2. If workers are permitted to refuse assignments, plant discipline will break down and chaos will ensue. Therefore, workers who refuse must be let go or otherwise disciplined.
3. To pay workers who have refused an assignment on the grounds that they consider it unsafe would be to pay them for not working rather than for working, and surely that no employer is bound to do.
4. If workers had the right to be paid in such circumstances, that would be tantamount to a right to strike with pay, and surely workers do not have *that* right.

In the first argument, the assumption seems to be that in accepting a job a person agrees to carry out any assignment falling within that job, so to refuse an assignment is a breach of the employment contract. There are at least two possible responses to this argument.

The first response is to deny that the unsafe assignment is part of the job. An assignment that poses a serious threat to life, health, or safety cannot be said to fall within the definition of any job except for those where extreme risks are expressly understood in advance. Even so, this is a matter of degree. Coal miners daily face risks most workers do not face simply by entering the mines. But if a tunnel ceiling has not been properly inspected and repaired, the fact that they have agreed to the risk of working underground cannot be used to argue that they breach that agreement if they refuse to enter a shaft that does not meet legally required—or other reasonable—safety standards.² A stunt

1. In either case (a) or (b), if the employer's version is accepted, the worker is precluded from collecting unemployment insurance in many states. One cannot collect in most states if one quits voluntarily or is fired "for cause."

2. It is neither necessary nor sufficient that a legal safety standard be violated before a worker may be justified in refusing an unsafe assignment. A violation may not be serious and may pose no immediate danger, hence, the assignment is not unsafe in

person agrees to accept risks that other actors are not expected, and would rightfully refuse, to face. But if a stunt person regards a particular stunt as poorly designed, or believes crucial safety equipment to be defective, he or she can rightfully say that *those* risks are *not* part of the job. According to this response, a crucial premise of the first argument is denied.

The second response does not deny that the assignment in question is part of the job. It points out that the employer has the legal and moral and often contractual obligation to provide a safe and healthy work environment. So it is the employer, not the employee, who has breached the employment agreement or contract.³ Still, many collective bargaining agreements contain grievance procedures, and a worker who alleges that the employer is in violation of the contract is normally expected to file a grievance and proceed with his or her assigned work.⁴ This approach is obviously inadequate in the case of a serious and immediate threat to life, health, or safety. Thus it is the seriousness and immediacy of the threat that supports the right to refuse. Such refusal is not itself a breach of the employment agreement, however; rather it is a response—the only adequate response available—to a breach by the employer.

Either way, there is no justification for claiming that, by refusing an unsafe assignment an employee either breaches the employment agreement or is insubordinate.⁵ It cannot be that, in accepting a job, one consents to all risks and hazards that may be encountered in that job. To be meaningful, the right of informed consent must apply at two

the requisite sense. So violation is not sufficient for justified refusal. On the other hand, there may be no specific standard covering a particular hazard which nevertheless poses a serious and immediate threat. In such a case, I claim, refusal is justified; so violation is not a necessary condition for justified refusal. So far, I am not talking about the *legal* status of the right to refuse; we shall come to that later.

3. Even if there is no written contract, or no explicit mention of health and safety in an existing contract, presumably fulfilling one's legal obligations as an employer may be understood as implicit in any employment agreement.

4. Unless the union agrees in the contract to give it up, workers do have the right to strike over contract violations. But we are talking now about an individual or several individuals refusing a particular assignment, not about a strike.

5. Insubordination is generally accepted as, and is explicitly recognized in many union contracts, as grounds for dismissal. (In most contracts, management has the right to fire for just cause, and in many 'just cause' is spelled out as including insubordination.) This reflects the traditional view that strict plant discipline is an important employer prerogative. It is revealing that failure to be subordinate should be grounds for voiding what purports to be a voluntary contract among equals.

levels. Before accepting a job and while remaining in it, one has the right to the information needed for informed consent to the risks that the job entails. One must also have the right to refuse a particular assignment one believes to constitute a serious and immediate threat to one's life, health or safety. And note that the right to know is an indispensable part of the right of informed consent at both levels. Both the right of informed consent and the right to a safe job are, in practical terms, empty if the price of refusing an unsafe assignment may be one's job. Indeed, these rights, along with all other rights of workers, are relatively empty in the absence of an effective right to a job. This is so in several ways, as we shall see below.

We have, I believe, disposed of the first of the employer arguments against the right to refuse. But what of the second argument, that if workers are permitted to refuse assignments, plant discipline will break down and chaos will result? We might look at the experience elsewhere, for example in Canada, where legislation passed in seven provinces during the 1970's guarantees the right to refuse:

Fears by management that health and safety issues would be exaggerated out of proportion or used to further other collective bargaining goals have not been borne out. In 1500 cases of work refusal in Saskatchewan, all cases were considered to be legitimate by Saskatchewan authorities. Experience has also shown that the increased worker participation in making actual operational decisions on health and safety has reduced potential for industrial conflict, in addition to raising awareness about safety. [*NJCOSH Newsletter*, May 1979, 1]

In Saskatchewan, the right to refuse is held by individual workers, though groups of individual workers can exercise it together. The worker or any member of the legally mandated union-management health and safety committee can call in an inspector to arbitrate if there is a dispute. (According to provincial officials, that occurs in fewer than five percent of the cases.) The inspector is required to render a decision as soon as possible, usually within twenty-four hours. If an employer feels that the worker did not have "reasonable grounds" to believe the situation was "unusually dangerous," the employer must prove it before disciplinary action can be taken. The employee must receive normal pay and benefits until the issue is settled. Even so, Jennie Smyth of the provincial safety division reports, "The right to refuse has been underused rather than overused. There have been many situations we hear of later in which people should have refused but were

afraid to" (Witt and Early, 1980, 25).

Workers in Sweden also have a strong right to refuse. Individual workers have the right to refuse dangerous work, and the government mandated safety committee (more than half of whose members must be elected by nonsupervisory employees) can shut down unsafe operations.⁶ They can be overruled only by a government inspector. Even if overruled, no worker can be punished for exercising the right to refuse unsafe work or stop an unsafe operation unless the action was taken in bad faith. Swedish central labor confederation attorneys report that they know of not a single case in which a worker has been prosecuted for deliberate abuse of these rights. Since the right of safety committees to stop dangerous work went into effect in 1974, use of it has resulted in the intervention of government inspectors only about twenty-five times per year in the country's 160,000 workplaces (Witt and Early, 1980, 25).

Considering that the right to refuse is vital to the effectiveness of the right to a safe job and to the right of informed consent to job hazards, the case against the right to refuse would have to be very strong indeed to justify its denial. That some unjustified refusals might occur would certainly not be sufficient reason. Yet there seems to be no reason to assume that workers would abuse the right to refuse, and experience where the right has been in effect for some years argues against the assumption. Thus the second employer argument fails.

The third argument is not directed against the right to refuse itself, but against the obligation of employers to pay workers who have refused an assignment on the grounds that it is unsafe. One potential buttress for this argument, that paying workers who have refused would lead to massive abuse of the right to refuse, is not plausible in light of the Canadian and Swedish experiences. Thus the argument must rest on the claim that it would be an injustice to the employer to require that a worker be paid after refusing an assignment, for this would require the employer to pay the worker for not working.

Many union contracts in the United States actually provide for the

6. These committees also have the following rights: to veto any plans for new machines, materials, or work processes for health and safety reasons; to decide how to spend the company health and safety budget; to approve the selection and direct the work of the company doctor, nurse, safety engineer, or industrial hygienist; to review all corporate medical records, monitoring results, and other information on hazards; and to decide how much time they need to do their safety committee work, all of which must be paid for by the company (Witt and Early, 1980, 22).

right of a worker to refuse an unsafe assignment, but do not guarantee that the worker will not sacrifice his or her earnings by doing so.⁷ The result is that the right is seldom invoked. In the course of discussing one case in which it was successfully invoked at a Republic steel plant, Charles Spencer writes:

Article Twelve reads: "If an employee shall believe there exists an unsafe condition. . .so that the Employee is in danger of injury. . .the Employee shall have the right. . .to be relieved from duty on the job in respect to which he has complained and to return to such job when the unsafe condition shall be remedied." It's not as simple as it reads. It's a bewildering and uncoordinated procedure that can be disastrous to any worker who invokes it. In the thirty years it has been a part of the union contract, it has never [until this occasion] been successful in correcting a single unsafe working condition—which accounts for the shift towards dependence on federal government intervention. Almost identical provisions are written into all union contracts, and the experience has been much the same.

Requesting to be relieved from duty until an unsafe condition shall be remedied runs into such hurdles as (a) Is there *really* an unsafe condition? who says so? (2) What's to happen to the workers "relieved from duty" if there's no other work available? They can't be paid for staying home. (3) Who shall decide if the unsafe condition has actually been remedied? (4) What happens to the other workers who aren't complaining and are willing to continue on the job?

There had been numerous instances at this plant where workers who invoked Article Twelve and requested to be relieved from duty on the job until an unsafe condition is remedied were "furloughed" for several weeks, during which they were not paid a penny and in the meantime other workers were assigned to and performed the same job. If the newly assigned workers had refused, they, too, could have been disciplined, even discharged. Although Article Twelve provides for the Company to reassign workers to another job when they invoke Article Twelve, it is the usual contention of the Company that no other job is available. (Spencer, 1977, 213-14).

7. This is true for large international unions such as the Steelworkers (U.S.W.A.), but many smaller unions have only recently begun to get any safety provisions at all into their contracts. (Even if all union contracts did have such provisions, that would cover only about 20 percent of the U.S. workforce.)

Another more subtle way in which workers are discouraged from exercising the right to refuse is explained in Rachel Scott's report of an interview with Ken Bellett, a steelworker at Bethlehem's Lackawanna plant:

The men themselves sometimes "forsake safety," he said, to make production. "Most workers are on some kind of incentive program. Every department has a different kind of incentive. Foremen are also on incentive and top management have a bonus system. Under contract terms, a man can refuse to do the job because it's unsafe. The guy will holler but then go ahead and do it. Otherwise, he's going to lose money that day. It's going to affect his earnings. If it means shutting down a whole department, the other guys will shoot you." The result is that often rather than shutting machinery down for repairs, maintenance workers have to work while it is operating. [Scott, 1974, 57-58]

Recall that two days prior to the fatal explosion at the Burnside foundry six workers were sent home for refusing to work near the pools of water in the tapping pits. Six workers lost their pay for the remainder of a shift, the unsafe condition was not corrected, and four workers lost their lives. Workers generally cannot afford to continue to refuse until a job is made safe. In part this is because, as long as it is the worker who is bearing the cost, if the employer can keep the operation going without the worker in question, the employer need be in no hurry at all to correct the unsafe situation. And a worker whose refusal would result in the shutting down of an operation faces not only his or her loss of earnings, but that of his or her co-workers as well. So the employer can rest assured that this will rarely happen.

In view of these considerations, it seems clear that the right to refuse an unsafe assignment cannot be effective unless (a) the worker's normal pay is continued after the refusal, (b) some person or group representing the workers, such as a safety steward or safety committee has the power to shut down an unsafe operation with no loss of pay to the affected workers, and (c) incentive programs such as those described by Bellett are eliminated or somehow revised so that workers are not constantly forced to make a trade-off between safety and earnings. Condition (c) appears to be necessary both directly, and as a necessary condition for (a) and (b).

A worker can, of course, complain to OSHA to get an unsafe situation corrected, but there are several reasons why this is no substitute for a strong and effective right to refuse. First, although OSHA at-

tempts to inspect within twenty-four hours situations in which the area director determines that there is a reasonable basis for the claim of "imminent danger," there is always some delay. The potential length of delay has been greatly increased by the Supreme Court's 1978 *Barlow* decision ruling that an employer may require an OSHA inspector to obtain a search warrant before entering the premises. If the worker stands to lose pay during that time, he or she is still in the position of choosing between economic loss which the worker may not be able to afford and doing the unsafe job for some period of time until an inspector arrives. If the inspector finds an imminent danger, he or she asks the employer voluntarily to abate the hazard and remove endangered employees from the area. If the employer refuses, OSHA, through the regional solicitor, applies to the nearest Federal District Court for appropriate legal action. Thus the potential for substantial delay is clearly present.

In addition, OSHA gives top priority only to inspecting situations where the area director determines that there is reasonable basis for the claim of "imminent danger." An "imminent danger" is defined in Section 13(a) of the OSH Act as "any condition where there is reasonable certainty that a danger exists that can be expected to cause death or serious physical harm immediately or before the danger can be eliminated through normal enforcement procedures" (Nothstein, 1981, 295-96). A "serious violation," which is not top, but third priority for inspection, exists under Section 17(k) "if there is a substantial probability that death or serious physical harm could result. . ." (Nothstein, 1981, 347). There are obvious difficulties in distinguishing in practice between an imminent danger and serious violation, so defined. A boiler about to explode is an imminent danger, but a boiler dangerously in need of repair could explode now or could rumble along for another six months or more. That it was about to explode is, I would guess, in the vast majority of cases, known only after the fact. Moreover, there are other problems about what constitutes an imminent danger. Health hazards, for example, are imminent dangers under the Act if there is a reasonable expectation that toxic substances or dangerous fumes, dusts, or gases are present and that exposure to them will cause irreversible harm to such a degree as to shorten life or cause reduction in physical or mental efficiency, even though the resulting harm is not immediately apparent (Nothstein, 1981, 296). Yet when the Oil, Chemical and Atomic Workers International Union claimed that pools of mercury on the floor of an Allied Chemical factory represented an imminent danger, and showed that at least twenty-five work-

ers in the area had symptoms (tingling in hands and feet, tremors, irritability, drowsiness, loss of memory, and sore gums) or chemical evidence of mercury poisoning, the Department of Labor ruled that "imminent danger" applied only when there was a "risk of sudden great physical harm. . .like a boiler explosion" (Stellman and Daum, 1973, 12).⁸

For these reasons, and because it seems to me that "substantial probability that death or serious physical harm could result" can be sufficient to warrant refusal, I believe that a worker's right to refuse cannot be limited to imminent danger situations. It must apply also to serious violations and to serious hazards that are not violations of specific OSHA (or other relevant) standards. But in the case of a serious violation, not only will there be a longer delay before an inspection, the employer will normally be given some period of time (possibly days, possibly months) in which to correct the violation while continuing in operation. An employer can then appeal any aspect of the citation, arguing, for example, that the situation is not a violation at all, or that it cannot be corrected in the time allotted. This can drag the process out still further. Or an employer can simply fail to correct the violation, the fine that may result usually being much less than the cost of correction.

Now one response to all this is that OSHA's enforcement system should be strengthened. There should be more compliance officers, and

8. Stellman and Daum report on the effects of mercury as follows:

. . .Whenever it is left open to the atmosphere, mercury vapor will be present.

Mercury is stored mainly in the kidneys, but its most striking effects are on the nervous system. A person with mercury poisoning can develop a slight tremor of the hands and no longer be able to write properly. Before that, there may be emotional problems such as anxiety, indecision, embarrassment, and depression, and also excessive blushing and sweating. Mercury poisoning can lead to speech disorders and loss of coordination. The victim may develop a staggering gait. Serious changes in mental ability and personality may occur. The expression 'mad as a hatter' refers to the fact that most hatters used to become crazy after practicing their profession over the years. The mercury they used to soften the felt in the hats poisoned them and eventually drove them mad.

Mercury also affects the vision and the eye reflexes. It particularly affects the mouth and teeth, causing loose teeth and sore gums. The kidneys may also be damaged.

These serious and often irreversible effects make it imperative to prevent all exposure to mercury vapor and other forms of mercury. . . [pp. 255-56]

they should have, and use, greater enforcement powers, especially in the case of imminent dangers and serious violations. This is certainly true.⁹ But such enforcement should be a complement to an effective right to refuse.

It is worth noting in this connection that there had been an OSHA inspection several months before the fatal explosion at the Burnside foundry. Workers had pointed out to the inspector the pools of water in the tapping pit. The water was not cited as a violation in the inspection report (*CACOSH Health & Safety News*, Vol. 6, no. 8, 1). Yet, after the explosion, OSHA officials conducted a two-week investigation and among the violations cited were these:

—Workers were required to work with and transfer molten steel and slag from furnaces to ladles where the material could contact water and wet surfaces.

—Water was allowed to seep into the tapping pits by improper maintenance of ground water draining systems and ineffective sealing of pit sides and bottom.

—During the weeks preceding February 16th, the furnace tapping pits were not cleaned, thus allowing water pockets to occur and increase the amount of water which would not be pumped out.

—The company did not provide adequate personal protective equipment to prevent exposure of maintenance workers to the hazards of burns.

—Repairs to a defective ladle tilting mechanism were attempted while the ladle was suspended over the tapping pit. [Kaye, 1979, 22]

The company was ordered not to reopen until all the violations were corrected.

One point this illustrates is that in many ways the workers themselves are the real experts concerning health and safety problems and hazards in their workplaces. They are there all day, day after day, year

9. In 1980, OSHA had enough inspectors to inspect each workplace once every eighty years; average fines were less than \$60 per violation, and standards to control the tens of thousands of toxic substances were being issued at the average rate of fewer than three per year (Witt and Early, 1980, 21). These figures can be expected to drop drastically during the Reagan administration.

after year. They see, hear about, and experience directly the accidents, near misses, headaches, sore throats, difficulty breathing, and the rest. Providing workers with whatever technical training is necessary, and empowering them to enforce their right to a safe and healthy workplace by means of an effective right to refuse an unsafe assignment, and to shut down an unsafe operation, is thus an eminently sensible approach to workplace health and safety. It cannot work, however, if it is not backed up by government intervention and enforcement in disputed cases. A strengthened OSHA enforcement system is needed as a complement. This would be a primarily *preventive* approach in two senses. It would be more likely to prevent injuries, deaths, and illnesses than a system which can only respond more slowly and often after the fact. In addition, the more effective the power to shut down an unsafe operation, the less likely workers would be to have to use it in order to get hazards corrected.

To illustrate, let us look again at the Swedish experience:

The degree of incentive for managers to reach agreement with workers on health and safety issues depends, of course, on the remedies available to workers. . . .

Since the right of safety committees to stop dangerous work was established in Sweden in 1974, use of it has required the intervention of government inspectors only about twenty-five times per year in the country's 160,000 workplaces. All parties interviewed agreed that this low figure was mainly a reflection of the effectiveness of the threat of using that power, and not a reflection of workers' reluctance to use it or of ignorance of their rights.

According to Bo Feldt, chief union safety committee member at the 12,000-worker Volvo plant at Goteborg:

We have over 200 safety stewards in the plant and their strength is in their ability to go to the foremen and say, "Do that or I stop the job." The foremen usually do it—whatever it is. If the men stop work, even if the government comes in and says work should continue, they can't be punished. But our experience has been that most of the stops have been correct stops. [Witt and Early, 1980, 25]

As we have seen, all of the incentives presently at work in our system seem to weigh against the employee exercising the right to refuse, and against the employer responding by correcting the condition promptly when the right is exercised. The requirement that employees be paid in the event of a refusal or a shutdown of unsafe work should

help to shift that balance, removing a strong disincentive to workers' exercising the right to refuse, and providing an incentive for the employer to act promptly to correct the condition so as to prevent or end a shutdown.

But, it may be objected, if there really is no other available work to assign the workers, would it not be unjust to require the employer to pay them? If it is unjust, then even if it would probably have desirable consequences, it may not be justifiable. The objection has not been satisfied.

My response is that it is not unjust. A worker is hired to do a job and shows up prepared to do it. He or she has a right to a safe environment in which to do the job. If that is not provided, the employer has failed to fulfill the employment agreement, as I argued in response to the first employer argument. What would be unjust would be for the worker, who has fulfilled his or her side of the agreement, to be forced to bear the financial loss resulting from the employer's failure to do the same.

Now it will be objected that I am assuming that the worker's claim that the assignment is unsafe is true, but often that is just what is at issue.

It seems to me that the worker must be given the benefit of the doubt in this situation. For one thing, it is his or her life that is at stake if the condition really is unsafe. The right of self-determination requires that a decision so importantly affecting his or her life be made by the individual. Moreover, the right to refuse could not be effective if the worker stood the chance of losing pay, or even his or her job, because the situation is later found not to have been unsafe. The worker might, of course, be right and still be "found" wrong. Or the worker may be wrong but have had good reason to believe the situation unsafe. So long as a worker believes in good faith that doing the work assigned would seriously threaten his or her life, health, or safety, the worker has, I claim, the right to refuse until the assignment is shown to be safe.

There may, of course, be occasions where a worker sincerely believes an assignment to be unsafe but does not have what other informed persons would regard as good reasons for that belief. I want to claim that the right to refuse without punishment or loss of earnings applies in such a case through an inspection and appeal process such as that outlined below. The distinction between good faith belief and good reason for the belief is implicitly recognized by not claiming for every individual worker the right to shut down an operation he or she believes

to be unsafe. The individual worker has the right to refuse for him or herself, and to have a trained safety steward or committee with the power to shut the operation down. Obviously, there may be difficulties in determining that an individual's belief is sincere in the absence of what informed and reasonable others regard as good reason for the belief. Nevertheless, I am sure that there could be cases in which the belief was obviously sincere, though ill founded. Partly because of this indeterminacy, the burden should be on the employer to show that a refusal or stoppage was not in good faith.

None of this would be an undue burden on the employer if the issues could be resolved quickly. The Canadian and Swedish laws provide a model for how this can be accomplished. We need (a) prompt inspection and resolution of any disputed refusal or shutdown situation (within twenty-four hours, say); (b) an accelerated appeals process available to both employer and workers (another twenty-four hours); (c) workers' pay and benefits continue as usual; (d) workers not subject to penalty for being wrong, but only for acting in bad faith; and (e) any penalty to be imposed only after the employer has demonstrated to the satisfaction of the appropriate reviewing body that the refusal or shutdown was not in good faith.

That such a system is not unworkable seems amply demonstrated by the fact that some like it are in operation elsewhere. That it would require the commitment of additional resources to health and safety administration is probably true. But again, the experiences in Canada and Sweden do not suggest that such a system would result in an unmanageable flood of refusals. Some such system seems a necessary condition for an effective right to refuse an unsafe assignment, which in turn is a necessary condition for satisfaction of the right to a safe job and the right of informed consent to job hazards.

What of the employer argument that the right to be paid after refusing an assignment would be tantamount to a right to strike with pay?

The right to strike is the right to engage, with one's co-workers, in the concerted action of withholding one's labor in an attempt to achieve some common goal. The withholding of labor here is an economic tool or weapon used in an attempt to wring some concession from the employer, or force the employer to honor some right of the employees on pain of loss of income resulting from halted operations. This right is guaranteed by Section 7 of the National Labor Relations Act of 1935, commonly called the Wagner Act.

Section 502 of the Wagner Act states: "Nor shall the quitting of

labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike." This distinction seems to me well-founded. In the case of refusing an unsafe assignment or shutting down an unsafe operation, workers are not using their refusal in an attempt to get the employer to honor their right to a safe job (though one may hope that it will have this effect). They are simply *exercising* their right to a safe job, which they cannot do, under the circumstances, without withholding their labor. The right to a safe and healthful workplace includes the right not to be exposed to unreasonable risks to life or health. So, in the same way that one exercises one's right not to incriminate oneself by refusing to answer questions one would otherwise be obliged to answer, one can exercise one's right to a safe and healthful workplace by refusing work assignments that involve unreasonable risks to life or health—assignments one would otherwise be obliged, under the employment contract, to accept. The withholding of labor is not used as an instrument or weapon at all in such a case. The purpose of such a refusal is not to bring economic pressure to bear on the employer; it is simply to avoid exposure to unreasonable risk.

Thus we must distinguish between refusing an unsafe assignment and shutting down an unsafe operation on the one hand, and striking (including striking over health and safety issues) on the other. A strike over health and safety issues might occur in an effort to get strong health and safety provisions in a contract, or to enforce existing legal or contractual health or safety provisions that are being violated, where the violation does not present a serious and immediate threat to life, safety, or health. Workers might strike to obtain access to information needed for a research or educational project on health and safety. Finally, workers may have shut down an operation they deemed unsafe, and gone through a process such as that outlined above, with inspection, ruling, appeal and final ruling. This much, I claim, they have the right to do without loss of pay, and this much does not constitute a strike. If now, they are dissatisfied with the final ruling and want to try to get the employer to make the repairs or changes they deem necessary for a safe operation, they may strike in an effort to achieve this.

I have argued that workers have a moral right to refuse an unsafe assignment and to have an individual or committee representing workers empowered to shut down an unsafe operation, and they have a right to these things without loss of pay. I have attempted to counter employer arguments against the right to refuse and against the right to be paid after refusing. I shall now report, briefly and without comment,

the current legal status in the United States of the right to refuse.

In 1973, the Department of Labor issued Interpretive Rule 1977.12(b)(2) which states that under the OSH Act an employee may refuse an assignment if the employee's apprehension is

of such nature that a reasonable person, under the circumstances then confronting the employee, would have concluded that there is a real danger of death or serious injury and there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.

The regulation prohibits employer discrimination against workers who exercise this right.

Employers continued to take action against workers who refused assignments on safety grounds, and challenged the regulation in resulting court cases. They argued that when Congress passed the OSH Act it rejected a provision which would have authorized workers to refuse unsafe assignments without loss of pay, and that the regulation would grant workers the right to strike with pay. They warned that the right to refuse would foster disharmony in the workplace, invite continuous labor unrest, and even industrial combat. Lower courts had ruled in conflicting ways on various cases involving the right to refuse, so the legal status of the right was in limbo until February 26, 1980.

On that day the Supreme Court ruled on a case stemming from a July 10, 1974 refusal of two maintenance workers employed by Whirlpool to climb onto a guard screen suspended twenty feet above the work area. Several workers had been injured in falls through the screen, and two weeks before the refusal another worker had fallen to his death. OSHA had ordered the screen repaired, but no repairs had been made. When the men refused, they were sent home for the remaining six hours of their shift and letters of reprimand were placed in their files.

The Supreme Court unanimously upheld the interpretive regulation, saying that it "clearly conforms to the fundamental objective of the Act—to prevent occupational death and serious injuries." "It would seem anomalous," wrote Associate Justice Potter Stewart, "to construe an act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous." The letters of reprimand were ordered withdrawn as they violated the prohibition against discriminatory action. The Court declined to rule on the issue of the six hours' pay the two men lost, saying that issue was

“not before the court.” The pay issue was sent back to district court to be reheard in the light of the Supreme Court’s ruling.¹⁰

There is, as far as I know, no legal provision for workers, whether individual workers, safety stewards, or committees, to shut down an unsafe operation, though some union contracts may contain such provisions. The original version of the “imminent danger” clause of the OSH Act allowed compliance officers to close down an operation in which an imminent danger was found. But the final version requires that, if the employer will not shut down voluntarily, OSHA must go to federal court.

Let me close this part of the discussion by trying to pull together what we now can say about the notion of informed consent. It probably is not possible to specify *sufficient* conditions for informed consent either in general or in relation to specific sorts of risks or activities such as workplace hazards, participation in scientific experiments, undergoing surgery, and so on. There are too many different kinds of factors which could be present in individual circumstances and which could undermine the adequacy of information or the genuineness of consent. One could not hope to think of all such possible factors and deal with them in advance. But, if what has been said on the subject in this and the preceding chapters is correct, we can say what several *necessary* conditions are for informed consent to job-related hazards or risks:

1. The offer to the potential or actual employee that he or she may accept or keep the job must not be a coercive offer. (There may be different accounts of what constitutes a coercive offer, as we noted in Chapter One, but that the offer must not be coercive for consent to be genuine should not be controversial.)
2. The employee must not be unnecessarily unfree to a high degree, as that notion is sketched out in Chapter One, with respect to the choice of whether or not to accept or keep the job. (This claim is more likely to be controversial.)
3. The right to know must be satisfied in at least all four of the aspects discussed in Chapter Two. (Another aspect of the right to know will be proposed below.)
4. The right to refuse an assignment believed by the worker to present a serious and immediate threat to life or health must be effective.

10. This account of the case and ruling is compiled from the following sources: *In These Times*, March 12-25, 1980; *Home News*, February 27, 1980; *LOHP Monitor*, Vol. 8, No. 2, March-April 1980; *Daily World*, February 28, 1980.

This requires that the workers not be subject to discipline, loss of job or earnings, and that a person or group in the workplace, representing workers, be empowered to shut down an unsafe operation without loss of pay to the affected workers.

Two additional candidates for inclusion are the right to advance notice of, and the right to veto or require changes in proposed new machinery, materials and work procedures for health and safety reasons. These rights are held by the Swedish joint safety committees mentioned above, which must have a majority of their members elected by the non-supervisory employees. These rights are clearly related to informed consent, but it might be argued that they go somewhat beyond the notion of informed consent into the more general area of self-determination, that is, participation in decisions which importantly affect one's life. In defense of the claim that they do come under informed consent, it might be pointed out that, without these rights, new machinery, materials, and processes often are introduced into the workplace with little or no prior notice, so that workers have no opportunity to explore, in advance of using them, what the risks and hazards might be. Hence, they cannot be said to have been accorded the right of informed consent with respect to these new factors introduced into the work environment. Moreover, once the new equipment or process is in place it may be impossible—it will certainly be more difficult and expensive—to make appropriate changes or choose a safer alternative. I would, therefore, claim that the right to advance notice is clearly a necessary condition of informed consent. The right to veto or require changes in plans might go beyond informed consent, but only on the assumption, or to the degree, that conditions (1) and (2) on the above list are satisfied. Indeed, I would add that the worker must not be unfree to a high degree, *whether or not* that lack of freedom was necessary.

Remaining in a job after a new hazard has been introduced can be said to constitute consent to that hazard only if a worker is free to quit. The fewer alternatives available to a worker, for whatever reasons, the less free that worker is to quit. The less free the worker is to quit, the more is the right to veto or require modifications in proposed new processes or materials a necessary condition for consent.

I said above that the right of informed consent and the right to a safe job, along with all other rights of workers, are relatively empty in the absence of an effective right to a job. Let us now explore some of the ways in which this is so.

First, the rights to informed consent and to a safe job have no

application in the case of a worker who cannot get a job at all.

Second, the right to a safe job, or any other right, is empty in the absence of effective guarantees against reprisals resulting from the exercise or attempted enforcement of the right. Employers are prohibited from discriminating against employees for exercising the rights guaranteed them under the Occupational Safety and Health Act and under the National Labor Relations Act. But workers know that employers can and often do cite other reasons for a dismissal or other disciplinary action, and there is no way to be sure one will get a favorable ruling if one contests the action. Most important, the employer's position prevails unless and until it is overturned by the relevant authority. And such a process will take months at a minimum, more likely years. The employer has every incentive for dragging the case out in the hopes that the worker will become discouraged and drop it. Meanwhile the worker is without any means of support, and all benefits such as health insurance are cut off. The prospect of back pay in the event of a favorable ruling, especially since one cannot count on it, is no help in paying rent and buying food. Thus the threat of dismissal is an extremely powerful deterrent to a worker's exercising *any* rights against the employer's wishes, despite legal "safeguards." Reversing the burden of proof, so to speak, in dismissal and other discipline cases could go a long way toward alleviating this problem (and would, in effect, acknowledge that workers have a right to due process in disciplinary matters generally, and property rights in their jobs which may not be set aside without due process).¹¹

In general, a strong union is much more effective at ensuring that workers may exercise their legal, as well as their contractual, rights than the courts or government agencies. The latter are useful, even essential, to a union's efforts in many cases, but they often are not very useful to the individual without union representation. This is so in part because of the problems of burden of proof and delay mentioned above, in part because, if the individual still has his or her job, filing a complaint is likely to bring further reprisals, including possible dismissal, in

11. In West Germany, the Protection Against Dismissals Act, passed in 1969, bars the "socially unjustified" dismissal of any worker after a probationary period of six months. The law is enforced by labor courts whose effectiveness originally was undermined by long administrative delays (up to five and six years in some cases). Now the unions can veto any individual discharge for "cause," and the worker stays on the job until the labor court decides. Cases are settled much more promptly now (*Economic Dislocation*, 23-24).

part because the individual is unlikely to have access to the kind of experienced legal advice and assistance needed to see the effort through successfully, and finally because the personal, emotional, as well as financial, cost of pursuing such a matter on one's own can be unendurable. Thus, effective rights relating to unionization are frequently necessary conditions in practice for the enforcement and exercise of even those rights provided by law for all workers whether or not they are union members. It is no wonder, therefore, that rights relating to unionization are among those rights the exercise of which is most likely to result in reprisals, as we shall see in the next chapter.

A third way in which the right to a job can be a necessary condition for the enforcement and exercise of other rights is that, in addition to individual workers facing the threat of dismissal or other disciplinary action, an entire workforce may face the threat of a shutdown or runaway shop. Getting OSHA, or other agencies at local, state, or federal levels, to set and enforce strong standards for the protection of the health and safety, or other rights, of workers is no victory for those workers whose employers' response is to pick up and move to a city, state, or country with weaker regulations, or none at all. Just like the individual worker who faces the threat of dismissal for refusing an unsafe assignment, workers who face the implicit or explicit threat of a shutdown or runaway shop in response to health and safety demands confront the choice: risk your life and health or your job.¹² This is not an idle threat. Between 1969 and 1976, fifteen million jobs were lost as a result of plant shutdowns. (DeCarvalho, *et. al.*, 1981, 1). And, of course, the difficulties of an individual worker who loses his or her job are multiplied by much more than just the number of workers affected by a whole plant closing. The prospects of finding another job in the area are far worse. An entire community can be devastated by the closing of a major plant.

I do not deny, by the way, that small and economically marginal businesses may sometimes be forced to close by even relatively small increases in costs. The Small Business Administration does make low interest loans to help small businesses finance costs of compliance with health and safety regulations. More should be done along these lines. It should not fall on the workers to sacrifice their health and safety to

12. Employers are prohibited from *threatening* to shut down or move in order to discourage unionization or to influence contract negotiations. They are not prohibited from *warning* of or *predicting* a potential shutdown or move. For employees, the prospect is threatening either way.

save their jobs. These small and marginal businesses are not the main problem in the current wave of shutdowns and runaways, however. According to MIT economist Bennett Harrison, "Globetrotting corporations will close profit-making plants if they aren't profitable enough, and if they can make more elsewhere." He notes that Sperry Rand closed a plant in Herkimer, New York because it wasn't making a 22 percent return-on-investment. Large conglomerates make money by buying out an independent company, "milking" the profits out of it, and then shutting it down. Then they get federal and state tax breaks for investing in new equipment and relocating. A study of the New England economy by Harrison and a colleague revealed that 100,000 businesses closed in New England between 1969 and 1976, costing a million jobs. Big corporations account directly for 15 percent of the shutdowns and over half of the job losses. But, in addition, many of the small independent businesses that close down do so in the wake of corporate shutdowns rippling through their communities (Dreier, 1980, 18).

Even a strong and militant union is largely defenseless against this threat, given the current legal situation in the United States. Our laws generally protect a company's right unilaterally to make all "investment" decisions. Yet this right is increasingly being questioned in view of the effects of such decisions on the lives of so many others. When the United Steelworkers of America filed suit to block a plant closing in Youngstown, Ohio, the court said:

This Court has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the close of the Mahoning Valley plants, and yet the lives of 3500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years.

Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation. At this moment, proposals for legislative redress of economic relocation like the situation before us are pending on Capitol Hill. Perhaps labor unions, now more aware of the importance of this problem, will begin to bargain for relocation adjustment funds and mechanisms and will make such measures part of the written labor contract. However, this Court is not a legislative body and cannot make laws where none exist—only those remedies prescribed in the statutes or by virtue of precedent of prior

case law can be given cognizance. In these terms this Court can determine no legal basis for the finding of a property right.¹³

The court here clearly recognizes the existence of a moral right of workers to their jobs. The right referred to here is a kind of property right, acquired, presumably, by working at a particular job. Legal recognition and protection of this right is a necessary condition for the protection of other worker rights. As the existence of this right becomes more widely recognized, there will no doubt be much controversy over precisely what it amounts to. I shall not attempt to resolve that question here. It may be useful, however, in thinking about the question, to see how some other countries are handling it, and what some proposed legislation in the United States looks like.

Sweden, West Germany, and the United Kingdom all have national legislation regulating plant closings and reductions in force (lay-offs). Typically, corporations are legally required to give advance notice to the national employment service, the union or works council, and the individual employees likely to be affected before closing a plant or dismissing workers for economic reasons. The amount of notice varies among the countries, and depending on the number of workers affected and the body being notified. Before implementing such a decision (and in some cases, before finalizing it), the company must negotiate with the employees' union or the plant's works council concerning possible alternative plans as well as the timing, distribution, and compensation above the statutory minimum for any layoffs that do take place. If no agreement can be reached, the matter goes to arbitration. Workers are entitled to time off with pay to look for new jobs, and for retraining in addition to severance pay, the minimum amount of which is established by statute and is pegged to the amount of time the worker has been employed by the company. In some cases the combination of notice and negotiation results in an alternative to the proposed closing or cutback being found. Often, the process is stretched out sufficiently so that a planned reduction is handled by attrition and no dismissals are necessary. When workers do lose their jobs, the proportion of income replacement provided by statutory unemployment benefits in the three countries is far higher than in the United States, payments to their Social Security accounts are continued on their behalf, and medical coverage, provided by the national health care system, continues. Inter-

13. *Steelworkers, Local 1130 v. U.S. Steel Corp.*, 492 F. Supp. 1, 103 LRMM 2925, 2931 (N.D. Ohio 1980). Quoted in DeCarvalho, *et al.* 1981, 1-2.

estingly, the United States is the only industrialized country besides South Africa without national health insurance.¹⁴

The National Employment Priorities Act was introduced in the United States Congress in 1979. If enacted it would require advance notification by companies planning to close or relocate plants. The amount of notice varies from six months to two years, depending on the number of employees to be affected. A National Employment Priorities Administration would be created within the Department of Labor. The Administration would investigate any proposed closing or transfer and recommend ways to avoid the closing or to minimize its impact on employees and the community. Employees would have the right to transfer to another facility of the same company at the same rate of pay. All relocation and retraining costs would be paid by the company or the federal government. If transfers were not available, the employer would be required to pay affected workers severance pay amounting to 85 percent of their average wage minus unemployment compensation for up to 52 weeks. Retraining programs would be provided for affected workers. Workers over the age of fifty would have the right to retire on reduced benefits. Pension and health insurance payments for all affected workers would be guaranteed for one year. The affected community would receive a mandatory one-time payment of 85 percent of the resulting annual tax loss.

Less comprehensive bills have been introduced in several state legislatures, including those of Ohio, Massachusetts, Pennsylvania, and Illinois. Clearly, federal legislation would be preferable, as states and municipalities often end up competing with each other, to the detriment of all of them, by offering concessions to businesses, such as tax abatement schemes, lax environmental standards, anti-union "right to work" laws, and a generally "favorable climate for business," in order to attract companies (and hence jobs) or persuade them not to leave.¹⁵

14. Information in this paragraph is from *Economic Dislocation*, Joint Report of Study Tour Participants, 1979, UAW, USWA, IAM.

15. Under section 14(b) of the Taft-Hartley Act, states may enact laws prohibiting the negotiation of union security clauses in union contracts. A union security clause provides that all employees within the bargaining unit must join the union after the probationary period for newly hired workers, usually thirty to ninety days. This makes it much easier for employers to break a union by hiring anti-union employees who, by both example and argument convince others to become "free-riders." Many southern states have such laws, resulting in the lowest percentages of unionized workers in the country and the lowest wages in the country—promoting opponents of these laws to call them "right-to-work-for-less" laws. (See Chapter Four for further discussion.)

The textile industry, for example, has virtually deserted New England, relocating either in the "Sunbelt," where few workers are unionized and wages are the lowest in the country, or in "developing" countries such as South Korea, Taiwan, and the Philipines. In these countries, repressive regimes friendly to U.S. business guarantee low wages, a well-disciplined workforce, and few or no health and safety or environment regulations. Indeed, the lure of these countries, where daily wages correspond to hourly wages in the United States, is so great that even the "Sunbelt" is losing some eighty jobs due to plant closings for every one hundred jobs created there (*Economic Notes*, Vol. 48, No. 5). Thus it is necessary that workers' rights be nationally and indeed internationally, guaranteed and protected if workers are not to be faced constantly with the threat that enforcing and exercising their rights as workers may cost them their very jobs.

Another approach to the protection of workers' rights to their jobs in the face of plant closings is to guarantee them and/or their community the right to buy out or take over the closed plant and run it themselves. This often would not be feasible, however, even if corporate co-operation and access to initial capital were available. One reason for this is that, as we saw above, corporations, especially conglomerates, often run a plant into the ground, failing to reinvest profits in necessary maintenance and modernization, siphoning them off into more profitable investments instead. So the doctrine that the owners of a business concern have the sole right to make decisions concerning the investment of profits from that business permits a company to let a plant deteriorate, while extracting profits from its operation, and then to abandon the plant—along with the employees and the community that have sustained the business—when it is no longer profitable. Clearly, if the right of workers to their jobs is to be protected, some restrictions on such investment decisions are needed.

Where feasible, however, this approach could be an important complement to legislation such as the National Employment Priorities Act. There are several possible variations of this approach, which could be applied individually or in various combinations.¹⁶ One variation would involve additional legislation requiring a corporation that has decided to close a plant to sell the plant to the workers or worker-community coalition if they choose to buy it, and providing for feasibility studies and grants or no-interest loans in cases where a feasible plan exists.

16. These variations are set forth in DeCalvalho, *et al.*, 1981, § VI.

Another variation would be nationalization. While this has been fairly common in other countries, in the United States government financial support, while increasingly accepted, has generally allowed for the continuation of prior corporate management. Under this proposal, the workers or worker-community coalition would manage the plant.

A third variation would be an expanded use of the eminent domain doctrine, whereby a city could condemn a property and take it over for the public good, including specifically to insure job opportunities. According to the doctrine of eminent domain, the former owners must be compensated, but the proper value may be determined by a jury of community residents.

A fourth variation is where workers facing a shutdown seize a plant and continue operating it on their own—either permanently or until some other way is found to keep it open. This variation might well be a necessary step, in practice, toward getting any legal recognition of workers' rights to their jobs. Historically, workers have had to exercise their rights independently of, and frequently in defiance of, the law in order to gain legal recognition and protection of those rights. As we shall see in the next chapter, this was true of both the right to organize and the right to strike—and many government employees must still defy the law to exercise their right to strike.

These approaches to protection of a property right of workers in their jobs, though only partial, would be an important step toward establishing recognition of such a right, and recognition of a corresponding limitation on the right of a corporation to make investment decisions without regard for their impact on the lives of workers, their families and communities.

But there are several reasons why I want to say that the right to a job is more than a property right. Or, to put it another way, in addition to the property right of a particular worker in a particular job, there is a more general right of a person to a job. One reason I want to say this is that the property right in a job does not apply to a person who is unable to get a job in the first place. But I believe that person has a right to a job.

Also, it seems plausible that the property right in one's job is vested, so to speak, over time—becoming stronger the longer one works at the job. This idea appears to be reflected in the standard union contract provision that distribution of layoffs be by inverse seniority, and in severance pay scales that are pegged to both rate of pay and number

of years on the job.¹⁷ This seems appropriate when weighing the claims of particular workers to particular jobs. But the worker with low seniority who keeps getting bumped off one job after another may put in many years of work without ever acquiring a strong property right of this sort in any job. Like the worker unable to get a job in the first place, the right of this worker to a job is not adequately represented as a property right in a particular job.

Moreover, it is, I think, commonly believed that if a property right is (legitimately) overridden, that right is adequately recognized, and its holder adequately compensated, if the full monetary value of the property is paid him or her. If this is correct, then if a (legitimate) plant shutdown results in a given worker becoming permanently unemployed (because unable to get another job) his or her property right in the lost job would be fully compensated if the appropriate proportion of projected earnings (up to 100 percent with sufficient years on the job) were replaced. This might be done by some combination of unemployment insurance, severance pay and early pension, adjusted over time to reflect as far as possible cost of living and wage increases that would have been received on the job.

There are at least two ways in which this wage replacement would not satisfy the worker's right to a job, even though it may well satisfy—or compensate for—the property right in the lost job. First, if the worker had been on the job only a short time, his or her property right (assuming that it is vested over time) would not amount to much. And if he or she is unable to find another job, this small amount does not compensate him or her for the opportunity to earn a living that the lost job represented. But if that amount is supplemented, say by welfare payments (justified by subsistence rights rather than job rights), so that the person has an adequate living, would there be any reason to say that his or her rights were not fully satisfied? I think there would, and this is the second way in which wage replacement would not satisfy the right to a job. Even a worker who receives 100 percent of projected income based on his or her property right in the lost job has a right to a

17. There are, of course, consequentialist considerations in favor of these practices, too, and these may be part of what gives rise to the property right and gives it this particular shape. A worker who has worked at a job for many years is likely to be older and have more difficulty finding another comparable job. One who has worked at a job for several years is likely to be settled and have heavy home and family responsibilities. But if these considerations were directly responsible for the practices mentioned, age and family responsibilities rather than seniority would be the appropriate pegs.

job, a right which is not satisfied by wage replacement. Persons have a right to subsistence even if they cannot make a positive contribution to society. But they also have a right to make a positive contribution if they can.¹⁸ The sense that one is making a contribution is a necessary condition of self-respect.

People need to feel that they are useful, productive members of society. This is not only a necessary condition of self-esteem and self-respect, but of mental and physical health generally.¹⁹ Thomas Cottle, a sociologist and psychologist at Harvard Medical School, has studied the emotional impact of unemployment for fifteen years. He calls unemployment "a killer disease." "In our culture, working is close to the center of life. Our culture teaches that if you don't work in an acceptable way, then you're supposed to be depressed. And when job loss lasts. . . a million symptoms show—tooth decay, kidney failure, alcoholism, sexual infertility." Moreover, he says, the unemployed suffering mental health problems often do not seek help. "A lot of people want to go for help, but they don't want to bear the extra burden of feeling that along with being out of work, they're also crazy."²⁰

Research by Dr. Henry Brenner of Johns Hopkins University for the Joint Economic Committee of Congress showed that every long-term one percent increase in unemployment means: a 4.1 percent increase in suicides; a 3.4 percent increase in admissions to state mental hospitals; a 5.7 percent increase in homicides; a 4 percent increase in admissions to state prisons; and a 1.9 percent increase in deaths from cirrhosis of the liver resulting from alcoholism (Brenner, 1976, V). A recent study of workers affected by a plant shutdown revealed a suicide rate thirty times that of the general population (Cobb and Kasl, 1977).

18. The Swedish approach to job loss places highest priority on finding the affected worker another job, rejecting the notion that early retirement, even with full pension, is an adequate substitute for a job. This shows a commitment to the idea that persons have a right to make a productive contribution to society. As a result, unemployment in Sweden is just over 2 percent (*Economic Dislocation*, 10, 12, 15). Even this is too high.

19. As I am using the terms, "self-esteem" and "self-respect," these attitudes toward oneself are distinct but related. To esteem someone is to hold that person in high regard, to have a favorable opinion of him or her. To respect someone is to acknowledge his or her dignity as a human being. According to the standard view, all persons are owed respect, even if one holds some of them in low esteem. I suspect that it is psychologically impossible fully to respect someone whom one holds in very low esteem. In any case, I am sure that very low self-esteem undermines self-respect.

20. Quoted in an Associated Press article by Jane See White, the *Home News*, New Brunswick, NJ, October 4, 1980.

Other studies have shown that unemployment is not only a source of psychological stress in itself, but also a cause of other stresses, such as having to move, becoming separated or divorced, all of which are correlated with higher rates of mental illness. Losing a job can set in motion a vicious cycle of other personal catastrophes that are much more difficult to handle for people who lack both the material and the emotional resources that a decent, stable job provides. Increased infant mortality and increased child abuse have also been linked to unemployment.²¹

It is, of course, likely that these effects would be ameliorated somewhat if loss of income did not accompany loss of one's job. But income, or other means of providing for subsistence (even at a fairly high level of material well-being) would not satisfy the need for a sense of oneself as a productive, contributing member of society. For most people in our society, that sense is inextricably tied to holding a job.²² That is what it means to most of us to "pull our own weight." And it is this sense of oneself as a productive, contributing member of society that I claim is necessary for self-respect, self-esteem, and mental and physical health generally.

It may be objected that people do not have a right to self-respect or self-esteem, or to mental and physical health generally. So how can the fact that a job is a necessary condition for these lead to a right to a job?

We do not have rights to these things because, important as they are, they are not things that other people, or society as a whole, can provide or guarantee. But society can provide or guarantee some of the necessary conditions for them, such as adequate shelter and nutrition, a safe and healthy home and work environment, access to adequate health care (both preventive and interventionist), educational and other opportunities to develop knowledge and skills and undertake challenging tasks. To these, I claim, we do have rights. And, in our society at least, the right to a job is one of these rights.

These same considerations, moreover, lead to the conclusion that the right to a job must be understood, not as the right to just some job

21. Annual report of the National Advisory Council on Economic Opportunity, 1979, excerpted in the *America Federationist*, October 1979.

22. This need not be so in all societies. There could be and there have been societies where there is nothing like a job, as we know them, to be had. Persons would, I suppose, still have the need for a sense of themselves as productive, contributing members, but it would take different forms in different kinds of society.

or other, however pointless, demeaning, and unchallenging, but the right to a job involving useful and challenging work.

In a paper discussing several studies of the mental health of workers in various kinds of jobs, psychologist Charles Hampden-Turner says:

Perhaps the most detailed and perceptive study ever made of the condition of American workers was that of Arthur Kornhauser (1964) who studied Detroit automobile plants along with other smaller factories in the area. He used a measuring index of "Mental Health." Those with "Low" Mental Health typically suffered at least two psychosomatic symptoms. They had low self-esteem, periodic feelings of depression, poor social relationships, uncontrollable anxiety reactions, strong hostilities, chronic distrust, and poor life satisfaction. The absence of such symptoms, plus a positive feeling of self-worth and strong friendships, constituted "High" Mental Health [Hampden-Turner, 1973, 33].

Only 34 percent of workers in large factories had high mental health (compared to 51 percent in small factories, 69 percent in nonfactory and 76 percent in white collar jobs). Moreover, the 34 percent with high mental health were mostly *skilled* workers, all with more than six years of steady employment and relatively secure seniority rights. The percentage of workers with high mental health correlated with job skill levels as follows: Skilled 58 percent; Semiskilled 35 percent; Repetitive semiskilled 10 percent; Repetitive, machine-paced, semi-skilled 7 percent. Only those with very similar pre-job characteristics were used in making this comparison, so these differences cannot be attributed to social background or education.

Hampden-Turner also reports the conclusion of a paper reviewing seven studies of worker satisfaction and dissatisfaction: "Karsh concluded that satisfaction is bound up with the degree to which the worker can exercise his own judgment on his job and the extent to which he can control the conditions affecting his work" (Hampden-Turner, 1973, 39).

A special task force appointed in 1971 by the then Secretary of Health, Education and Welfare, Elliot Richardson, said in its report:

We have sufficient evidence about the relationship between work and heart disease, longevity, mental illness and other health problems to warrant governmental action. That jobs can be made more satisfying and that this will lead to healthier and more productive workers and citizens is no longer in doubt. [*Work in*

America, 1973, 114]

In a paper entitled “Meaningful Work” (1982), philosopher Adina Schwartz argues that commitment to an ideal of autonomy for all persons leads to the claim that no one should be employed in routine, repetitive jobs in which workers decide neither the overall goals of the enterprise nor how to perform their own jobs. She says that an individual achieves autonomy “to the extent that he/she rationally forms and acts on some overall conception of what he/she wants in life,” and she argues that the empirical literature strongly supports the claim that autonomy, so understood, is undermined by such jobs. To achieve autonomy, people need to have opportunities to frame their own goals and decide how best to pursue them. Not having such opportunities at work undermines people’s motivation and ability to be autonomous in the rest of their lives. She quotes Arthur Kornhauser in support of this claim:

Factory employment, especially in routine production tasks, does give evidence of extinguishing workers’ ambition, initiative, and purposeful direction towards life goals. . . . [Kornhauser; 1965, 252]

The unsatisfactory mental health of working people consists in no small measure of their dwarfed desires and deadened initiative, reduction of their goals and restriction of their efforts to a point where life is relatively empty and only half meaningful. [Kornhauser, 1965, 270]

It is, I think, significant that the same conclusion emerges from a commitment to the idea of autonomy on the one hand, and from the more mundane-sounding commitment to guaranteeing, as far as possible, the necessary conditions for mental and physical health on the other. Schwarz’s conception of autonomy includes, and goes beyond, self-determination, as I have been using the latter idea. As we have seen in this discussion and in earlier chapters, the right of self-determination both supports and is supported by health and safety rights. If, in addition, we are, or should be, committed to promoting autonomy, then we have another argument for the self-determination of workers in their work. It may not be an *independent* argument, however, for I suspect that something like Schwarz’s conception will turn out to be the only plausible and coherent account of autonomy, and I further suspect that autonomy, so understood, is an important, perhaps the most

important, aspect of mental health.

To sum up this part of the discussion, there are several ways in which health and safety rights and the right to a job are connected. The right to a safe job is empty if the cost of refusing an unsafe assignment is one's job. It is also empty if the cost of strong legal and/or contractual health and safety provisions is a shutdown or runaway shop. The right to a job arises as a necessary condition for self-respect, self-esteem, and mental and physical health generally. The right to a useful and challenging job arises both as a necessary condition for mental and physical health and from the right to a safe and healthy job. Finally, a commitment to promoting autonomy also provides support for the right to useful and challenging work.

An exploration of the implications of the right to *useful* work would involve us in assessing *what* gets produced in our society and *why*. (Why are steelworkers and autoworkers, out of work as a result of plant closings or cutbacks, not employed in production to meet urgent human and social needs such as mass transit? Why are construction workers out of work when there is an urgent need for housing—both the renovation of existing stock and the building of new?) Exploring the right to *challenging* work would require us to look at *how* the work that is done is carried out, as we have begun to do here.

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Keeping Capital and Jobs at Home

Deborah Groban Olson*

The International Association of Machinists' (IAM) proposed New Technology Bill of Rights is a fine concept because it clearly addresses the key new technology issue for workers which is: Who will benefit from the new industrial revolution? How can workers gain control over the process instead of being its casualties, as they were of the first industrial revolution? Yet the proposed Bill of Rights, as a United States law, would only be applicable to technological changes being made in the United States. Workers' rights to negotiate over technological change, even under the proposed New Technology Bill of Rights, are limited by management and stockholder decisions regarding the allocation of capital. Crucial decisions about if and where to invest capital in new plants and equipment are not touched by this new Bill.

Various plant-closing bills¹ have been introduced which seek to require companies to give adequate notice, provide adequate reasons for closing plants, or to pay significant sums to aid workers and communities injured by plant closings. This legislation is intended to serve as a deterrent to such closings and to give workers and communities time to persuade the employer to stay, to find alternative uses for the facility and work for the displaced workers. Many European countries have such laws which they have used successfully to prevent unemployment while assisting industries changing to more modern methods of production.² In recent years the United States political climate has not been right for passage of such legislation. Politicians fear plant-closing legislation will create a bad business climate and cause more businesses to leave, despite the success of such legislation in Sweden, West Germany

* B.A., J.D. Univ. of Wisconsin. The author is a practicing attorney and Executive Director of Michigan Employee Ownership Center.

1. See W. SCHWEKE, PLANT CLOSINGS: ISSUES, POLITICS AND LEGISLATION BRIEFING BOOK (1980), for a description and comparison of the National Employment Priorities Act of 1979 and a variety of state laws and proposals.

2. See UNITED AUTO WORKERS, UNITED STEEL WORKERS ASSOCIATION, INTERNATIONAL ASSOCIATION OF MACHINISTS, JOINT REPORT OF THE LABOR UNION STUDY TOUR PARTICIPANTS: ECONOMIC DISLOCATION (1979). See also Bellace, *An Update on European Economic Community Law*, 171 *Daily Labor Report* A-4, E-1-6 (Sept. 1, 1983) [hereinafter cited as Bellace].

and the United Kingdom.³ However, similar ideas are currently being circulated under the concept of "Industrial Policies."⁴

Unless and until some legislation exists in the United States which makes it difficult for companies to move plants to lower wage areas, they will continue to do so.⁵ It is not simply that plants in the unionized frostbelt are moving to the lower wage, non-unionized sunbelt. Many sunbelt states have lost plants to overseas low wage countries.⁶ "Whereas labor costs might vary by ten percent between regions within the United States, the variation between the U.S. and the Third World might be eight or nine *hundred percent*."⁷ "A General Motors (G.M.) employee in Kenya is paid \$102.00 per month, in South Africa, \$2.25

3. See generally *supra* note 2.

4.

The AFL-CIO urges the creation of a National Reindustrialization Board, consisting of representatives of the public, labor and industry, which would recommend the priority and magnitude of reindustrialization to be undertaken in various industrial sectors and geographic regions, in light of the national economic and security interests. . . . The Board should be empowered to direct the activities of a Reindustrialization Finance Corporation (RFC), which would make or guarantee loans or participate in loans made by private lenders to finance reindustrialization projects approved by the Board.

Statement by the AFL-CIO Executive Council on Reindustrialization, in Chicago, Illinois (Aug. 20, 1980).

5. B. BLUESTONE, B. HARRISON, AND L. BAKER, *CORPORATE FLIGHT: THE CAUSES AND CONSEQUENCES OF ECONOMIC DISLOCATION* (1981) [hereinafter cited as BLUESTONE].

6. *Id.*

[B]etween 1969 and 1976, frostbelt firms destroyed about 111 jobs through plant closings for every 100 new jobs they created, while companies in the South and West shut down 80 jobs while opening 100. . . but the Frostbelt-Sunbelt movement is not the whole story. In fact, there is now a great deal of evidence pointing to disinvestment from the *South as well*, jobs either lost or moved out of the country entirely. Surprisingly, the rate at which manufacturing plants have been closing is actually *higher* in the South than anywhere else; from 1969 to 1976, the odds that a plant which employed more than 100 workers in 1969 would be shut by 1976 were better than one in three in the South. Part of what is happening in the South, thanks to the international growth of corporations. . . is the continuing movement of capital outside the U.S. Southern states would seem to be experiencing—in a much more compressed time period—the same 'turnover' of capital. . . as the north has experienced.

Id. at 15-16 (emphasis in original).

7. *Id.* at 52 (emphasis in original).

per hour, and in Brazil (where GM fired 1,000 workers last year because they refused to give wage concessions), \$1.80 per hour.”⁸

Many previous concerns regarding plant location have been radically alleviated or eliminated due to the advances in telecommunications and computer technology which have occurred in the past ten to fifteen years. Ford Motor Company, for example, has just completed a new ten million dollar computer center in Dearborn, Michigan, a suburb of Detroit. During the day five thousand Ford engineers and technicians across North America plug into the system, and at night their counterparts in England, Germany, Switzerland and Spain have access to the same information and thus work on the same project. Responding to basic decisions made in Dearborn, Ford staffers throughout the world are able to relate to one another as if they were in the same room.⁹ Ford’s new “world” car is a product of this type of computer technology. Although Ford touts it as an “import fighter” in the United States the car’s parts are made in twelve countries throughout the world, from Yugoslavia to Brazil.

General Motors will be producing four-cylinder engines for their world cars in five countries, with no single country producing more than one or two of the three engine types involved. This type of production arrangement provides GM and Ford with considerable leverage should an unexpected strike or shutdown occur in any single country.¹⁰ In the event of a strike or work stoppage, the present state of computer technology allows GM and Ford to transfer work to another location, even in another country. Companies in the United States have already utilized this new technological capability to move work from a plant experiencing a work stoppage, “struck work,” to another plant.¹¹

8. G. Horn, 25 *C.E.R.P. Newsletter* 2 (Sept. 1983) (published for limited circulation by UAW C.E.R.P. Committee, Montrose, Michigan).

9. Address by H. Shaiker, Conference on the Auto Industry, Wayne State Univ. Weekend College (March 28, 1982).

10. Shaiken, *The New World Car, Detroit Downsized U.S. Jobs, The Nation*, Oct. 11, 1980.

11. Die work is the easiest for a company to move around and is facilitated by the organization of world car production. It allows manufacturers to bypass labor troubles. It is conceivable for a company to send a tape from a reprogramable robot welder in Dearborn to a new plant in South America, which does not have skilled tradesmen, to aid in the set up of an offshore operation. NC machines doing machining or die-making can definitely transfer that more readily. Unbeknownst to UAW leadership at the time, in a 1976 tool and die strike GM took computer tapes from the Cadillac Seville striking unionized tool and die shops and, reportedly, sent them to other places, even into the GM Flint, Michigan die making program. Interview with Bob King, Pres-

Several studies have shown that prevailing wage levels, work force skill level and amenities of life for executives are important factors in plant location. Government regulations are less important except to the extent that they increase the "social wage," and tax incentives are not significant.¹² In the past it was necessary for a manufacturing company to balance these factors in some fashion and to locate someplace which accommodated all these needs. However, it is now possible to accommodate all these needs either in separate places or to obviate some of them by the use of new technology. Using systems such as Ford's Dearborn computer center, corporations can retain their executive, technical and management personnel in the United States while utilizing foreign labor.

Specifically, by use of computer controlled production processes and computer and telecommunication links between plants and management, the corporation can obtain most of the information and control it needs with very few managers or technicians at the production site. Computers can maintain records on a worker's attendance and time his work.¹³ Robots can be reprogrammed to do different work without any mechanical retooling,¹⁴ and many computer controlled sys-

ident of UAW Local 600 by Steve Babson (April 16, 1983) [hereinafter cited as King interview].

12. BLUESTONE, *supra* note 4, at 64-76.

13. This has been a major concern of the Communications Workers of America in their technology negotiations. See, e.g., C. Heckscher, Second Annual Summer School on Extending Workplace Democracy, University of Michigan (Aug. 1, 1981).

14. The Robot Institute of America, an industrial trade group, defines a robot as [a] reprogrammable, multifunctional manipulator designed to move material, parts, tools, or specialized devices through variable programmed motions for the performance of a variety of tasks.

Reprogrammable and multifunctional are the key words. Factories have long used automatic machines (like bottle cappers) to mass-produce goods, but these devices could only perform one task at a time. New work routines required new machinery or extensive retooling. The industrial robots now being installed have control and memory systems, often in the form of minicomputers. These enable them to be reprogrammed to carry out a number of work routines and, when necessary to be reprogrammed to carry out even more.

The Robot Revolution, Time, Oct. 8, 1980, at 72, 75.

Take a welding machine in the stamping plant. The fixed mechanical parts of that are not that adaptable, but the control system is tremendously adaptable. You can sit there and in 30 seconds or a minute you can reprogram in there a different sequence of welding operations, different heats and things like that. Whereas, before if you wanted to make some

tems can troubleshoot their own problems,¹⁵ eliminating the need for a skilled maintenance person. Unlike past automation which involved significant investment in hardware that became obsolete over time and was expensive to replace, a reprogrammable robot can be taught new tasks without major changes in its hardware. Its old function may be changed by a simple, inexpensive change in its computer program¹⁶—a

major changes you might have to do some rewiring or put some new controls in. You do not have to do that now.

King interview, *supra* note 11.

Flexible manufacturing systems—FMS. . . consist of computer controlled machining centers that sculpt complicated metal parts at high speed and with great reliability, robots that handle the parts, and remotely guided carts that deliver materials. The components are linked by electronic controls that dictate what will happen at each stage of the manufacturing sequence, even automatically replacing worn-out or broken drill bits and other implements.

Measured against some of the machinery they replace, flexible manufacturing systems seem expensive. A full-scale system encompassing computer controls, five or more machining centers, and the accompanying transfer robots, can cost \$25 million. Even a rudimentary system built around a single machine tool—say, a computer-controlled turning center—might cost about \$325,000, while a conventional numerically controlled turning tool would cost only about \$175,000.

But the direct comparison is a poor guide to the economies flexible automation offers, even taking into account the phenomenal productivity gains and asset utilization rates that come with virtually unmanned round the clock operation. Because an FMS can be instantly reprogrammed to make new parts or products, a single system can replace several difference conventional machining lines, yielding huge savings in capital investment and plant size.

Bylinsky, *The Race to the Automatic Factory*, *Fortune*, Feb. 21, 1983 at 51, 53.

15. The maintenance done on robots would require less skill than the maintenance done in the past. Many of the computer systems now are designed to do a lot of their own troubleshooting. If something is wrong, you can ask the computer a question or ask the programmable controller a question and it will tell you an answer. Whereas, before you would have had to use your own brain to figure it out and to follow through a number of logical processes, now the computer can do that. In some cases, rather than repairing, say, some relays or changing some wires, you might go in and pull a whole computer board out, plug in another one and send the bad one to the manufacturer.

Now that the computer does its own troubleshooting, the computer repair person must be highly skilled but the machine operators and maintenance personnel need less skill. Therefore, fewer skilled workers are needed overall. King interview, *supra* note 12.

16. The Pragma A-3000 is a \$110,000 robot licensed by General Electric to as-

task which can be handled by telecommunication between computers and requires few on site skilled personnel.

If a wage differential is significant enough to offset the disadvantages of long distance, management can continue to enjoy the advantages of suburban life in the United States while running plants in Asia, Latin America or other low wage areas. Limited skill in foreign workforces can be overcome more readily by use of computer controlled processes and reprogrammable robots. Therefore, until there is a more uniform wage scale around the world, or until there is legislation limiting plant relocation or foreign investment, regulation of the introduction of new technology in the United States will have limited efficacy in preserving jobs in this country. The New Technology Bill of Rights proposal is important because it aims for greater worker control over technology. But in addition to proposals for control over technology, more attention must be paid to obtaining control over capital investment decisions.

Much has been done in the area of union control over investment of pension funds since Jeremy Rifkin and Randy Barber first wrote *The North Will Rise Again, Pension, Power and Politics in the 1980's*. Since its publication the AFL-CIO and many of its affiliates have adopted positions favoring increased union involvement in the investment and control of union pension funds.¹⁷ Yet the idea of employee ownership has generally been shunned by the United States labor movement,¹⁸ although there have been a number of recent union experiments with it. Unions have had some bad experiences with worker ownership, such as South Bend Lathe Corporation where workers gave up their pension rights to get one hundred percent of the stock in their company, but they did not receive voting control over the stock.¹⁹ Such cases show that worker ownership is a mechanism which can be used to limit rights gained by unions. However, with increased experience unions are learning how to use employee ownership mechanisms to give

semble a compressor valve unit from twelve separate parts. Its two arms do totally different jobs at once. It produces 320 units per hour without mistakes making it roughly the equivalent of ten human workers. It can easily be reprogrammed to assemble TV sets or electric motors or, theoretically, just about anything. Time, *supra* note 15, at 72.

17. See INDUSTRIAL UNION DEP'T, AFL-CIO, PENSIONS: A STUDY OF BENEFIT FUND POLICIES (1980).

18. Olson, *Union Experiences with Worker Ownership*, 5 WIS. L. REV. 729, 737-38 (1982) [hereinafter cited as Olson].

19. *Id.* at 747-752.

employees control over their workplaces commensurate with their investment and risk. Some examples of successful employee ownership efforts include Rath Packing Company,²⁰ Hyatt Clark Industries,²¹ Atlas Chain Company,²² O&O Markets,²³ and Eastern Airlines.²⁴

The European Economic Community (EEC or Common Market) is making serious efforts to maintain controls over multinational firms which operate in Europe by enacting in member states uniform or conforming legislation which covers many areas including labor relations. In the 1970s they enacted directives which were adopted by all member states concerning: equal pay for work of equal value; requirements that employers "consult" with worker representatives before any collective layoffs "with a view towards reaching agreement" on ways of avoiding or reducing the number of permanent layoffs and of mitigating the consequences of terminations; safeguarding employee rights by requiring consultation with employee representatives prior to any transfers or undertakings including acquisitions, mergers and takeovers of businesses or part of a business; as well as provisions on occupational safety and health.²⁵ There are two proposed EEC directives, the Vredling Initiative and the Fifth Draft Directive on Company Law which, if adopted by member states, will greatly expand worker representatives' knowledge and involvement in making major corporate decisions.

The Vredling Initiative would impose a duty on employers of companies with one thousand or more employees in any configuration within all the EEC countries to provide yearly information to their employees' representatives yearly without the need for a specific request for the information.²⁶ Where an employer proposes to take a decision which is liable to have serious consequences for the interests of its employees in the EEC, the employer will be required to forward precise

20. *Id.* at 753-759.

21. *Id.* at 760-763.

22. Collins, *Atlas Chain Employees Close to Plant Takeover*, Scranton Times (Sept. 11, 1983).

23. D. CLARK & M. GUBEN, *FUTURE BREAD: HOW RETAIL WORKERS RANSOMED THEIR JOBS AND LIVES* (1982) [hereinafter cited as D. CLARK & M. GUBEN].

24. Loeb, *Eastern Air Says 3 Unions Agree to Concessions*, Wall St. J., Dec. 9, 1983; Salpukas, *Eastern's Unions Agree to Pay Cut and Accept Stock*, N.Y. Times, Dec. 9, 1983; Barber, *The Wage Investment and Union Role in Management Agreement At Eastern Air Lines* (IAM's press release background information, Dec. 1983) [hereinafter cited as Barber].

25. Bellace, *supra* note 2.

26. *Id.*

information to the subsidiaries concerned "in good time before the final decision is taken."²⁷ Local management must transmit the information to the worker representatives who are to be given at least thirty days to review it before the action can be taken. The worker representatives have a right to consult with local management regarding the information.²⁸ The recently revised Fifth Directive applies to public limited liability companies employing more than one thousand persons.²⁹ Member states can elect to have one or two-tier board structures. If a two-tier structure is used, the member state must provide that at least one-third and at most one-half of the seats on the supervisory board will be filled by employee representatives. In a one-tier board, nonexecutive members would appoint the executive members of the board. At least one-third and not more than one half of the nonexecutive members of the board would be employee directors. Two other alternative models are also permitted which would achieve the same type of participatory rights as these two proposed directives.³⁰

Labor law in the United States makes no attempt to control multinational firms in any of their actions outside the country and does not give workers any right to a voice in the types of decisions, such as plant closings and layoffs, on which European worker representatives are already consulted. There is no serious legislative effort underway to obtain anything like the Vredling or Fifth Directive rights for American workers. However, in the United States, collective bargaining has frequently been a stronger tool than in many European countries because under section 9(a) of the National Labor Relations Act³¹ a union here is recognized as "sole collective bargaining agent." Therefore, we must look to collective bargaining as the most promising immediate source for innovation in obtaining more employee control over investment and disinvestment decisions in the United States.

The recent pact between the IAM and Eastern Airlines is a very good example of an attempt to obtain many of the Vredling and Fifth Directive rights through collective bargaining. In December, 1983, Eastern Airlines entered into a precedent-setting agreement with its workers and their unions after the unions were allowed to make a com-

27. *Id.*

28. Bellace, *supra* note 2, at E-2, 3.

29. *Id.*

30. *Id.* at E-3, 4.

31. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study From An American Perspective*, 28 AM. J. COMP. L. 367 (1980).

prehensive analysis and audit of Eastern's financial conditions:

Eastern workers agreed to invest 18 percent of their wages (22 percent in the case of pilots) in return for one-quarter of the company's outstanding stock and a new form of 'profit sharing' preferred stock. In exchange, they secured a broad range of new rights to participate directly in management of Eastern: from membership on the Board of Directors, to unlimited access to financial information, to participation in decisions concerning the business plan and capital expenditures, to involvement in the design of new facilities, to innovations in a number of day-to-day issues affecting individual workers.³²

The parties refer to the one year agreement as a "trial partnership" between Eastern and its workers which was agreed to after six years of constant confrontations involving threats of bankruptcy, strike breaking, and default. If the union role in management provided by the agreement is effectively implemented, the unions and their members will have achieved an entirely new level of authority and a significantly expanded role in the operations of the company.

This agreement could represent a watershed event in the relationship between labor and management in the United States. At the least, this agreement provides unions a new threshold they can demand companies meet when approaching workers for financial relief. If a company is serious about obtaining this relief, it must be willing to give back something of value (like a significant ownership share in the company) and it must be willing to give over to its workers a range of powers, rights and responsibilities that have previously been strictly the prerogatives of management. Specifically, the Eastern agreement provides for: (1) employees to place eighteen percent of their salaries in a wage investment program to purchase twenty-five percent of Eastern's common stock and to purchase \$260 million in participating, preferred stock (which has a liquidation preference ahead of common stock and is convertible to common); (2) employees to provide increased productivity savings (however, all contractual work rules and benefits have been maintained); (3) Eastern to work with labor on revision of its business plan; (4) Eastern to work with labor on its financial restructuring program; (5) ongoing union review of business plans, major capital expenditures and expansions; (6) union right of appeal to Eastern's Board

32. Barber, *supra* note 24.

of Directors; (7) continuing unlimited access to Eastern's financial information; (8) IAM-designated member on Eastern's Board of Directors; (9) job security and reduction of outside work contracts; (10) joint review of labor-management relations; (11) participation of union in design of facilities; (12) joint review of supervisory and lead roles and functions; (13) implementation of effective employee involvement program; (14) joint board for IAM pension fund; (15) full disclosure of consultant hiring; (16) joint review of employee benefit plan administration.³³

While it is too early to tell if all of this will work as designed, this ambitious plan includes the types of disclosures required by the EEC's Vredling Initiative. The board representation is not as great as that required by the Fifth Directive, yet the ownership of twenty-five percent of the stock in a publicly traded company is a very significant interest. However, it is the vast array of other agreements which clearly show the value to the union of obtaining virtually total disclosure and of proposing a true partnership with an employer seeking concessions. Although when a union or group of unions is willing to get into the driver's seat of a company and help run it, it does take on some risks,³⁴ it also has much more control over decisions which affect job security. For example, in the Eastern agreement union representatives are involved in reviewing all consultants and outside contractors hired in order to determine if union members might be able to do that work and save both jobs and money.

In 1980, Wendell Young, President of United Food and Commercial Workers International Union (UFCW), Local 1357 in Philadelphia, began investigating employee ownership as one of several new approaches to the problem of plant closings and job security for his members. He found the lack of notice of plant closings to be the greatest obstacle to solving work loss problems. In their 1980 negotiations with Atlantic and Pacific Tea Company (A&P), UFCW locals 1357 and 56 gave up their cost of living allowances (COLAs) in exchange for an agreement by A&P to give twenty days advance notice of any proposed store closings and first right of refusal for employees to buy the stores.

In July of 1982, A&P announced the closing of twenty-two stores in the Philadelphia area. The union proposed an employee buyout of

33. *Id.*

34. Olson, *supra* note 18, at 780-814.

these stores.³⁵ A&P reconsidered, sold two of the stores to the employees and created a new subsidiary, Super Fresh, in the twenty others and in a total of fifty-six stores in the Philadelphia area. The Super Fresh stores have an extensive program of worker involvement in management, a reduced fixed wage package and a unique profit-sharing plan. Super Fresh contributes approximately one percent of the gross annual sales per store (which keeps its labor rate at nine to ten percent) to an employee controlled trust fund.³⁶ Sixty-five percent of the fund is distributed to employees as cash bonuses, and thirty-five percent is contributed to the employee owned and operated investment fund, to provide start-up capital loans for democratically controlled employee owned businesses in the Philadelphia area. The fund expects to receive \$400,000 from the Super Fresh profit-sharing plan in the fiscal year ending in July 1984. This fund will be augmented by leveraging in several ways. It is a member of the Small Business Administration's Philadelphia Small Business Investment Corporation through which it can obtain three to fourfold leveraging on money it invests in employee owned businesses. The fund is also seeking loan guarantees, rather than grants, from foundations and corporations.³⁷

The two A&P stores purchased by former A&P employees and members of Locals 1357 and 56, were reopened as employee-owned and operated. Each of the two is a separate cooperative. They work together and intend to form a service cooperative for themselves and any additional employee owned stores or businesses in the area.³⁸ All the employees in these stores are union members. They have negotiated a contract with the UFCW which is similar to that of other organized supermarkets in the area. Joe Osner, meat manager of one employee owned store, says:

We are doing better than we expected. We are competitive. We do not feel any conflict of interest with the union. If it were not for

35. Presentation by Wendell Young, President of UFCW Local 1357, the National Center for Employee Ownership (NCEO) and Coalition Against Plant Shutdowns (CAPS) Conference in Los Angeles (March 4, 1983). *See also* D. CLARK & M. GUBEN, *supra* note 23.

36. Telephone interview with Jay Guben, Director of O&O Investment Fund (July 20, 1983). Super Fresh Markets & UFCW Locals 56 and 1357 Collective Bargaining Agreements (Signed May 12, 1982).

37. Telephone interview with Jay Guben, *supra* note 36.

38. Telephone interview with Andrew Lamas, Staff Attorney, Philadelphia Association for Cooperative Enterprise (PACE) (July 26, 1983).

them, we would have no jobs. They got the consultants and negotiated with A&P for the sale to us. We are successful. The union is successful. We owe them a lot, and we work together well. I have heard the theoretical question raised, 'If the workers own the store, who needs the union? Won't they decertify?' But I have yet to hear one word on decertification from anyone here. We are out to prove that workers can run a successful business. The union has done nothing but help.³⁹

The O&O Markets model chosen by the UFCW is intended to translate the Mondragon, Spain industrial cooperative model into a unionized American context.⁴⁰ The UFCW's Wendell Young stated this goal as follows:

It would have been of no long term benefit to the Union to help create jobs that would undercut the jobs of other UFCW members in the same industry. This concern for continuity meant that the model that evolved would necessarily have to be sensitive to the presence and prerogatives of organized labor in whatever area of the economy in which it is applied.⁴¹

Rath Packing pioneered the concept of using employee stock ownership plan (ESOP) financing and a one vote per person voting trust to hold and vote the employees' controlling interest in a bloc. The initial goal was to preserve jobs and keep the business going, retaining the pension plan and master collective bargaining agreement wage standards, while taking temporary wage deferrals to be repaid through profit-sharing.⁴² However, in September 1982 Rath terminated its pension plans⁴³ and in 1983 filed a Chapter 11 petition seeking to renegotiate its collective bargaining agreement with the UFCW. Rath's later troubles were substantially caused, however, by having one of the oldest facilities in a seriously troubled industry, excess capacity, and the loss of a line of credit.⁴⁴ Thus, the Rath structural model should still be

39. Telephone interview with Joe Osner, Meat Manager, President of the Board of Directors of the Front Street O&O Market, and President of the Board of Directors of the O&O Fund (July 20, 1983).

40. D. CLARK & M. GUBEN, *supra* note 23.

41. *Id.* See introduction by Wendell Young, at iii.

42. Olson, *supra* note 18, at 753.

43. *Id.* at 759-60.

44. Warneke, *Rath: Reorganization May Save Iowa Plant*, Omaha World-Times, Nov. 10, 1983.

seen as a valuable model of a cooperative employee stock option plan.

In situations which are not employee buyouts, employee ownership is frequently used as a type of employee benefit because of the tax advantages available to employers. Employee ownership may be a limited tool for obtaining worker control over investment decisions and new technology, simply because workers do not have the capital to command an important voice in most corporations. However, since the tax laws first made employee stock ownership plans (ESOP) advantageous⁴⁵ to employers in 1973, their use has grown enormously. There are over 5,000 ESOP companies in the United States⁴⁶. Many large firms have some form of tax credit or tax-deductible ESOPs (General Motors, Ford, Chrysler, McLouth Steel, Wheeling-Pittsburgh Steel, Pan Am, Eastern, Western, and Republic Airlines, to name just a few). Most of these plans provide for a pass through of stock voting rights to the employees. The more traditional ones, such as the Ford and General Motors tax credit ESOPs, simply serve as another fringe benefit, and provide for individual members to vote their allocated stock.⁴⁷ Pan Am⁴⁸ and Eastern provide for union representation on the board of directors. The Chrysler plan⁴⁹ gives union members a fifteen to twenty percent interest in the company which is the largest single bloc of Chrysler stock, although it is not designed to be voted conveniently as a bloc. Douglas Fraser, retired United Auto Workers Union (UAW) president, sat on the Chrysler Board. So far the UAW has not convinced Chrysler to make that seat one which is appointed by the union, however the union has asked for more board representation in negotiations.⁵⁰ The above are important initial efforts to gain some permanent voice over crucial corporate decisions in exchange for union wage concessions. However, the examples of Eastern Airlines, the United Food Workers, and Rath Packing show that much more can be done to obtain worker and union control over corporate decisions. Stock ownership can be a useful tool especially if it can be voted as a bloc. First right of refusal to buy facilities, advance notice of proposed closings or sales, creation of an employee owned and operated investment fund,

45. Olson, *supra* note 18, at 732-737 nn.1-5, 15.

46. C. ROSEN, *EMPLOYEE OWNERSHIP: ISSUES, RESOURCES & LEGISLATION, A HANDBOOK FOR EMPLOYERS AND PUBLIC OFFICIALS* (1981).

47. Olson, *supra* note 18, at 773.

48. *Id.* at 778.

49. *Id.* at 775.

50. Interview with Douglas Fraser, former President UAW at Wayne State University, Detroit (Dec. 14, 1983).

and continuous information and input into corporate decisions aimed at decreasing contracting out are other useful tools.

In order to stem the tide of capital flight, more must be done to obtain local control over capital assets and investment decisions. It is on these decisions that job security ultimately depends, whether or not new technology is involved. Employee ownership is not the only way to significantly increase involvement in such decisions. Many other forms of codetermination or worker involvement in management exist. But most of those which involve worker participation in making investment decisions without ownership are mandated by legislation, as in the case in certain Western European countries.⁵¹ Since such laws do not yet exist in the United States, American workers and unions need to broaden bargaining horizons to protect themselves. They should utilize the concept of employee ownership and negotiate for other controls, such as those on contracting out, to preserve existing capital resources in this country before a significant amount of those resources are permanently invested overseas. Over the past fifteen years an enormous number of American firms have expanded overseas because low foreign wages are attractive and new technology made foreign expansion easy to do so. This trend is not likely to end unless it is curbed by legislation on plant closings, local content and tax laws which do not encourage foreign investment. The governments and labor organizations in the EEC countries have determined that labor involvement in making corporate decisions at the highest levels is essential to balance the needs of the worker population against the needs of the corporations. The same is true in the United States. However, the political process here has not advanced to such an understanding. Therefore, private action by American workers, unions, organizations, and concerned communities is necessary to preserve a viable capital base in this country since many United States-based corporations no longer need to produce their goods here.

51. INT'L LABOUR OFFICE (ILO), *WORKER PARTICIPATION IN DECISIONS WITHIN UNDERTAKINGS* (1976 and 1981). See also Bellace, *supra* note 2.

New Technology: a Catalyst for Crises in Collective Bargaining, Industrial Discipline and Labor Law

A Personal Account of *Williams v. Pacific Maritime Association and International Longshoremen's Warehousemen's Union**

Stan Weir**

Eighty-two San Francisco longshoremen, myself among them, were fired from their jobs on the same day in 1963. The purpose of this article is to report from a participant's viewpoint this event; the events leading up to this mass firing; its context in the automation of the longshore industry; and the subsequent litigation, lasting until 1981, which was generated by these discharges.

I. The Firing

While we longshoremen who were the objects of these firings were at work on June 19, 1963, letters were delivered to each of our homes. They contained notices that we had been "deregistered" (discharged) as full-time employees of the Pacific Maritime Association (PMA), an employers' association. Somewhere in the port of San Francisco in the preceding weeks we had been tried, found guilty and received the maximum sentence—economic capital punishment—all by secret process. These events resulted in the first mass firing of longshoremen represented by the International Longshoremen's and Warehousemen's Union (ILWU) since that union was founded in the general west coast maritime strikes of the 1930s. It also marked the first time that the ILWU had ever been party to the discharge of dock workers.

*384 F.2d 935 (9th Cir. 1967), *cert. denied*, 390 U.S. 987 (1968) (reversing summary judgment for defendants and ordering trial); 421 F.2d 1287 (9th Cir. 1970) (sustaining trial court rulings dismissing individual defendants and claims for punitive and exemplary damages); 617 F.2d 1321 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981).

**Publisher Singlejack Books, San Pedro CA. Former Instructor, Labor Education Programs, Univ. of Illinois.

Written under the letterhead of the Joint Port Labor Relations Committee (JPLRC) of the PMA-ILWU, the identical and unsigned discharge letters did not specify charges. Instead, they told us only that the firings had been accomplished "pursuant to the provision of #9 of the 'Memorandum of Rules Covering Registration and De-registration of Longshoremen in the Port of San Francisco. . . . Such de-registration was based upon the determination of the Committee that you have violated the applicable rules." Upon studying this provision, we discovered that it contained a list of all the "applicable rules," ten of which outlined specific violations; the eleventh, and last rule, allowed the governing parties to fire "for any other cause." This failure to specify charges was a violation of the Memorandum of Rules which contained in its text a model of the letter to be sent as notice of de-registration. In the appropriate position on the model was a blank space under which were the instructions, "Here list the charges."

In addition to this omission, the joint committee's letter of June 19, 1963 addressed to each of us read:

In the event that the Joint Labor Relations Committee receives within fifteen days after the date of this letter, a detailed written statement signed by you, satisfactorily demonstrating that there is no ground for your de-registration, and requesting a hearing, you will be given a hearing, at which time you may show cause, if any you have, why such de-registration should be rescinded.

Even had we been willing to endure the submission, it was impossible for us to write demonstrations of our innocence as asked, or in any other form, for we were denied a list of charges. The ILWU had a national reputation as a progressive union yet every concept of democratic due process was being violated. There was no precedent for what was happening to us and, although we knew that the rank and file exercised limited power, we were witnessing a complete reversal in the basic role of a union. This was not the result of some veiled form of gradual bureaucratic drift; the top officialdom of the ILWU was collaborating with employers, literally doing management's job out in the open by institutionalized means. The joint parties to the collective bargaining agreement obviously felt free to select victims and then design new rules to dispose of them in brazen disregard of long-established procedures.

At least twenty-five of us who received the deregistration notices responded by asking for an immediate hearing. All requests were

granted and appeal hearings were set for July 9, 10, and 11, 1963, in the cargo shed on Pier 24 of the Embarcadero in San Francisco. Our attempts to learn the charges and prepare a defense continued to prove futile. Union officials would not meet with us or answer our phone calls, registered letters or telegrams. A state of confusion, with many conflicting rumors, existed within the general membership of ILWU San Francisco Local 10. The joint committee had accomplished the firings without making the identities of the victims known to the rest of the bargaining unit. Since the rank and file were no more organized than we there was no vehicle for communication between them and those who were terminated.

In an effort to exhaust all possibilities, on July 7, I sent the following telegram to R.R. Holtgrave, then Secretary of the JPLRC, with copies sent to ILWU International President Harry Bridges and PMA President Paul St. Sure:

RECEIVED YOUR LETTER NOTIFYING ME THAT I AM
TO HAVE HEARING JULY 11TH. I WILL BE PRESENT
BUT YOU HAVE NOT YET TOLD ME THE CHARGE YOU
INTEND TO TRY ME FOR. I AGAIN REQUEST YOU SO
INFORM ME AND NOT FORCE ME TO APPEAR WITH-
OUT PREPARATION.

Holtgrave's answer by return wire on July 9th, became the one break in the official silence that lasted until the opening day of the hearings. It read:

YOUR UNION IS YOUR EXCLUSIVE BARGAINING REP-
RESENTATIVE ON YOUR GRIEVANCE. UNLESS YOU IN-
TEND TO PROCEED INDEPENDENTLY WITH THE EM-
PLOYERS UNDER SECTION 9 OF THE NATIONAL
LABOR RELATIONS ACT YOU SHOULD CONSULT WITH
YOUR UNION REGARDING THE HEARING.

Section nine of the amended National Labor Relations Act, commonly known as the Taft-Hartley Act, allows employees to bypass their union and to process their own grievances with management on an individual basis. This was of no use to us because our fight was to get union representation, not get away from it; to get collective protection and put an end to the vulnerability we were experiencing as individuals. In a last ditch effort just hours before the appeal hearings, I sent a copy of Holtgrave's wire to Local 10 President James Kearney along with an appeal for representation and the provision of charges. Even though

Holtgrave's response designated the union as the terminated dock workers sole legal representative, I received no reply.

On each of the hearing days the scene in the waiting room outside the makeshift hearing chambers on Pier 24 had a "death row" atmosphere. We gathered by numbers as instructed and awaited our turns. None of us was broke or broken, but the experience was taking its toll. There was none of the good humored banter that is commonplace at dock worker gatherings. We had all now experienced unemployment for three weeks. It was futile to file new job applications without listing our employer for the previous four years. The PMA had denied our unemployment insurance claims on the ground that we were "voluntary quits," that is, we had followed a course of conduct that we knew could end only in termination of employment. There was a silence among all of us at the hearings because the futures of whole families were about to be determined. Many of us could not expect to ever again find employment that equaled our chosen occupation. Ninety percent of our number were black. They, and others as well, faced the specter of returning to their marginal jobs of pre-waterfront years. We too had temporarily withdrawn to that "low" which is the hope for individual escape.

The door to the hearing chamber opened. A sergeant-of-arms stuck his head out and called a name. One of our men answered, rose stiffly and went inside. The door opened again a few minutes later and another name was called. But what had happened to the first man? It wasn't hard to make an accurate guess. As each hearing concluded the appellant was being ushered out a rear exit, down an alternative stairway and off the pier. For us, the contrivment exposed the true nature of the hearings and made us angry. When my turn came I entered and took the lone chair facing the judges on the other side of the long table. Local 10 President James Kearney and business agents Joe Perez and Dick Harp nodded hello to me but R. R. Holtgrave of the PMA and his two assistants did not look up from their papers. These six comprised the Joint Port Labor Relations Committee (JPLRC). It was they who had signed the official deregistration notices. Now they were acting as their own appellate court.

The biggest unknown for me, in that room at that point, was the presence of eight or nine other men. The man in the bow tie seated at the center of the table I guessed to be Richard Ernst, head counsel for the PMA. The younger man next to him was obviously an assistant. In the next seat was Tommie Silas, formerly a local union business agent with a longtime reputation as an errand runner for Harry Bridges.

Both Silas and the other former Local 10 official next to him had stacks of paper in front of them, but Kearney and the other union officials did not have a scrap. Clearly, it was Silas and his colleagues who were being cast in the role of prosecutors yet they held no elected office. Where did they get the authority?

My memory began to provide some possible explanations. These men were members of the Joint B List Committee who five years earlier had processed our applications and interviewed us along with about seven hundred others who were being recruited to the industry. The formation of this committee was viewed by some longshoremen as a defeat for Local 10. Previously, from the beginning of the union, Local 10 had held substantial control over entry to employment in the port. With the establishment of the Joint B List Committee, control over hiring was now in the hands of the employers and the leadership of the international union. I surmised that the B List Committee must have been the body that tried us in secret and decided to discharge us. In process were the beginnings of a move by the international union to essentially eliminate Local 10's control of the grievance procedures by which firings had been held to a minimum. Local 10 President Kearney had thus far refused to make an issue of it before the rank and file. To avoid open battle he was rubber stamping the victories of the PMA. The mass discharge was going to remain a smokescreen for a continued power grab, as will be seen later in this text.

JPLRC Secretary Holtgrave confirmed my chain of deductions. In his role as hearing chairman he read to me from a list of rights and instructions for appellants and stated that I was not to be allowed counsel, the right to face accusing witnesses, nor the opportunity to produce witnesses in my own behalf. I would be informed of the general area of the rule infraction that I had committed, but I could only learn the exact detail of the charges by going to the Joint PMA-ILWU Records Office two weeks later. The chairman concluded his instructions to me with a statement to the effect that I was now free to make any defense in my own behalf that I deemed appropriate. I questioned Holtgrave and learned that the committee was going to make its final judgment before we had the opportunity to learn the exact nature of the charges in the Records Office and none of the signatory judges would be present at that time to hear our defense. Holtgrave then turned the hearing over to Silas who quickly stated that over a four-year period I had falsified entries on job dispatch records to give me more hours of work than I would have received had I not, in effect, crowded into line ahead of co-workers during the daily hiring process. I

countered that his allegations were false. It was my word against his and the only evidence of my innocence was the forms on which I had allegedly made dishonest entries. Not surprisingly, they had somehow been destroyed.

I warned all present that we would not submit to this frame-up silently. I rose to leave but before I could reach the exit door the assistant PMA attorney called me back. He had a set of questions designed to get me to say that I considered the discharge action a form of discrimination according to Section Thirteen of the union contract. That section established an exclusive grievance procedure for anyone who claimed he had been discriminated against for racial, religious, or other reasons. The assistant PMA attorney's attempt to curtail our ability to file suit in civil court failed. During a trial in federal court eleven years later, this same man would be one of two former PMA attorneys to testify in the plaintiff's behalf.

On the night of July 11, just three hours after the hearings concluded, President James Kearney called a regular business meeting of Local 10 to order. He then made a motion which demanded that the eighty-two men who had been fired for alleged falsification of job dispatch sign-in sheets be returned to their jobs at once. Even if finally proven guilty, thirty or more of the men who had been fired would have been first offenders. The rules called for discharge only on the third proven offense. A second motion was immediately made from the floor by Hal Yanow, a former bodyguard of Harry Bridges. It demanded that those of the eighty-two men who were fired for paying their dues late eight times or more during their four years of employment be reinstated because there was no rule in existence which made that a disciplinary offense. All the men in question had each paid the standard one dollar fine for each day they had paid late and none were in arrears at the time of discharge. Many of those sitting in that meeting could probably have been terminated under this very same rule. The recorded minutes of the July 11, 1963, meeting show that both motions passed by an "overwhelming majority."

Kearney presented these motions at the next meeting of the JPLRC. The PMA contingent voted "nay." Due to the ensuing deadlock the motions were passed up to the next organizational level, the Area Labor Relations Committee, for a decision. A member from each side of that joint committee was present. They called themselves to order and Local 10's motions were denied. With that vote, Local 10's short and concerted effort to save us was dead.

About ten days later we lined up in front of the Joint Records

Office. We wanted to exhaust every possibility for learning specifically the charges against us. Our efforts produced little more information than we already had. B List Committee members, one from each side, were present to confront us with our supposed rule violations and another stalemate ensued. They still were unable to present us with any evidence of record falsification and insisted on their right to apply retroactively the heretofore unheard of rules that had put us all in double jeopardy.

Several days later we began to hear conflicting rumors from the waterfront. We had heard that two of the firings had been rescinded and that there might be an extension of the appeals procedure. Approximately twenty-five of us gathered to talk over what had happened. As a result of that meeting we sent a delegation to the PMA headquarters to learn if any further appeals were possible. The answer was no. This response and the lack of rank and file support demanded that we make a decision, either to drop the whole matter and walk away or resort to the courts. Few of us felt there was really a choice. Most had relatives still working on the front. We were determined to prove our innocence and we knew that without jobs as longshoremen, many of us would be demoted to poverty level incomes. Before relating a short history of our seventeen-year legal battle it is necessary to provide some of the historical background for the discharges and their direct relationship to the employers' present and planned investments in mechanized and computerized cargo movement machineries.

II. Historical Background

The first clarification that must be made is that the eighty-two men fired in 1963 were not members of the ILWU. We worked under its jurisdiction, but by agreement between the PMA and the union we were not allowed to join. We were "B" men, part of approximately 750 men who began work on the San Francisco piers in 1959, eventually known as the '59 men so that differentiations could be made as more "B" men were brought into the industry in 1963, 1965, 1967 and 1969. The San Francisco '59 men were the first to enter the shipping industry in that port without membership in the ILWU since the formation of the union. In effect, we were second class citizens.

Earlier, in 1934, west coast longshoremen had established the most complete form of rank and file control over the daily hiring process known to waterfronts around the world. As a result of an arbitration award in 1934 by the Franklin Roosevelt administration's National

Longshoremen's Board, longshoremen in each port took virtually total control of recruitment in the industry. The local unions, rather than the shipping companies, began to issue work permits to new longshoremen. In San Francisco, "permit men" quickly became probationary members of the union and at the end of a six month period they became eligible for full union membership. After their formal induction into the union, local union officials applied for and routinely obtained registered status for them. This procedure involving a substantial form of workers' control was weakened during World War II and came under full attack in the 1950s with the introduction of new technology.

In 1952, top military transportation authorities, acting under the auspices of the National Academy of Sciences, began to urge the nation's ship operators to jettison traditional man-handled or by-the-piece cargo operations in favor of new methods utilizing large metal containers moved in and out of new type vessels by giant cranes or on truck trailers. As the first containership was being introduced in the Pacific trade by Matson in 1957, the waterfront employers went to ILWU President, Harry Bridges, with a proposal for a new method of recruiting longshoremen. They wanted a pilot program that would take control of that process from the rank and file and place it in the hands of the top officials. After several attempts, Bridges was able to overcome rank and file resistance to the program and implemented it the following year.

During 1958, the appointees to the B List Committee screened over ten thousand applicants and made selections for employment. In June and August of the following year, over seven hundred of these applicants went to work as full time hold-men, those who work inside the hatches of the ships in port. The conditions of their employment were new and in many ways consistent with the "B" label. Not only were they denied membership in the union, but in order to attend union meetings they had to sit in a segregated section of the balcony in the meeting hall.

It is hard to imagine a more restrictive definition of "permanent status" employees than the one applied to us as '59 B men. It did not matter that our incomes were often less because we got the work that was left after the A men (union members) took their pick of the jobs available each day. If we took a second or part time job outside the industry—or enrolled in a school—we were subject to deregistration. We received the same basic pay as the A men, but in other conditions of employment there were substantial dissimilarities. The inability to participate in the election of union officials, for example, meant that we

too often worked without the benefit of on-the-job union protection. This arrangement was formalized by the creation of an especially stringent set of disciplinary rules for governing our conduct. At the same time, there was no limitation put on the time we had to serve before getting union membership and A status, even though we had been promised that "graduation" would occur within a year, at maximum.

The official reason which circulated around the waterfront for the creation of a B category of longshoremen was that most of the "old-timers," who were registered prior to 1948, found hold work difficult. In their advancing middle age they had taken the less physically arduous jobs on deck and dock. This meant that in the years just prior to the recruitment of the B workers, most of those doing hold work were hired off the street on a daily basis. The recruitment of a new cadre of hold men was a necessity for the employers but there was a problem. The planned container technology soon to be introduced would eliminate thousands of jobs in a few years. It would be difficult to lay off "recent hires" if they had a voice in the union. The B list program was the attempted solution to the employers' dilemma.

The program had additional dividends for the employers. It performed the function of splitting the work force, which would be particularly valuable if resistance to the introduction of new technology developed. There was also another factor which also cannot be overlooked; on the Pacific Coast waterfronts and around the world, hold workers are traditionally the most militant section of the labor force. Not only are they the youngest and most active, they comprise the tightest unit within the total longshore gang operation because they work deep in the hatch where entry by supervisors can involve some risk.

The '59 B men came to the waterfront at the time when the first mechanization and modernization (M&M) collective bargaining agreement was being negotiated. It was ratified by the A men on a coastwide basis in 1960 and went into effect in early 1961. Bridges had made a bargain in which most of the work rules won by the union in the 1930s were sold in return for the creation of a special money fund. It gave all A men retiring at age sixty-five a bonus of seventy-nine hundred dollars or the bonus could be used by those who wanted to take early retirement.¹ Thus, the disappearance from the front of the generation which had built the union was hastened.

1. In the second six-year mechanization contract which went into effect in 1966, the bonus was raised to \$13,600.

In 1960, the port of Los Angeles was the second largest on the west coast. Its ILWU Local 13 organized the strongest resistance to this agreement and was the only local whose majority voted against the contract. The local came under hard attack. A popular business agent was fired after representing men involved in a stop work action. Bridges negotiated a special and more restrictive version of the mechanization agreement for that port and subsequently a majority of Local 13 approved it. Short of waging an all-out rebellion, they had no choice. We in San Francisco were unaware of any resistance in Los Angeles until we found ourselves working cargoes originally destined for that port.

In San Francisco, the only group resistance to this agreement, however modest, came from the B men. During the long negotiation period, we badgered A men informally on the job about the concessions that Bridges was making to the employers. The resentment among us became very apparent in the early months of 1960. True to its word, as soon as we had put in six months on the job, Local 10 formed its investigating committee and began to process us for membership. They were stopped by higher level authority within management and the union. The freeze on A registrations was rationalized because the automation of the industry was just ahead. Many jobs would be eliminated and the jobs of even senior men were in jeopardy in certain ports. The men in those ports with high seniority had a right to move to ports not yet "distressed." They took precedence over B men. Our admission to the union and registration as A men would have to wait until the impact of containerization was studied on a coastwide basis.

The top officials of the local and many rank and file members expressed deep doubts about these delays. There was talk that the international union and the PMA were using automation as an excuse to encroach upon the rights of the local. Fear of the effects of the coming containerization was running high but it was hard for many of the workers to suddenly develop a distrust of Bridges. He regularly came to local meetings and talked as though the introduction of the new technology and a resolution of the B men's concerns, was months instead of years ahead. Over half of the membership of Local 10 were black men. In vast majority they had come to the Bay area in search of jobs at the outbreak of World War II. Circumstances had led them into longshore work. Unlike the experience of many of their friends who entered other industries at that time, the ILWU did not segregate its black workers into "colored" locals and for them Bridges symbolized that positive experience. It was extremely difficult for them to now believe that this same man was manipulating them.

Not long after the freeze on A registrations and union membership, the executive board of Local 10 passed an unexpected motion which urged that the B men elect representatives to the executive board. At the next B men's meeting, three representatives were elected. I was one of them. All three of us openly expressed our own feelings, and those of the men who had elected us, against the mechanization agreement. We were under full attack the moment we arrived at our first board meeting. What some members called the "Bridges group," led by International Representative William Chester, raised so many objections to our presence that no business could be conducted. Several months later two of the B representatives, William Davis Edwards and Robert Marshall, were fired.

On the first day that the mechanization agreement went into effect, hold men found themselves working sling loads of hand-handled cargo that were double or more the weight of those that had been hoisted in and out of hatches the previous day. Thus, the elimination of the work rule that had for twenty-five years limited man-made sling loads to 2,100 pounds was the first change to be felt. Other work rule losses were experienced in turn. Principally among these was a rule the longshoremen had won in order to protect the autonomy of each work gang. The rule denied walking bosses the right to fire individuals from gangs and make those who replaced them work short handed; thus eliminating the employer's ability to single out so-called troublemakers. "If they want to fire one of us they will have to fire us all", had been the 1930s approach to the problem. The new agreement circumvented the rule by cutting the number of hold men in a gang from eight to four. Eight men were still required on hand stowage operations so half that number were dispatched to the gangs with the artificial label of "swingmen" who could then be fired singly.

While these changes in the relations between supervisors and workers on the job were being made there was little change in the nature of cargo handling methods. Despite the negotiation of a so-called "automation" contract in 1960, the mass introduction of container technology, as some had suspected, did not occur until the late 1960s. For half a decade employers were able to run hand-stow and discharge operations, virtually free of work rules. Production almost doubled. Thus, the longshoremen were directly subsidizing the purchase of the very machines that would kill over half their jobs by 1980.²

2. As of 1982, there were less than eight thousand active registered longshoremen working on the west coast of the United States.

As productivity climbed, so did accident rates. Between 1958 and 1967, U.S. waterfront employers reported a 92.3 percent increase in the number of workers' compensation cases "despite efforts to engineer problems out of the workforce."³ This condition increased their open lobbying of the A men for entry into the union, but the long and gradual growth in their boldness was reversed in one night by Harry Bridges. The founding president of the ILWU addressed a compulsory meeting for B men in early 1962. His blunt speech climaxed with the statement that "[we B men] were getting black marks all the time and not just from the employer side." Minutes later Bridges returned to the microphone and announced that the B men no longer had any representatives of their own because "we are representing you," and added that if we wanted responsible advice we should seek counsel from a B man and close friend of his, Pat Tobin (later to become the ILWU representative in Washington, D.C.). Local 10 vice president Walter Nelson chaired the meeting and was the only local union official present. He heard Bridges totally wipe out the representation of B men on the local's executive board. The international union had just violated the local union's autonomy, yet Nelson made no challenge and the meeting adjourned.

For the next six months there was far less communication between A and B men on the job. The silence of the B men was so sustained that probably it was construed as a threat. Informal pressures were being felt off the job as well as on. Waterfront talk that originated in official circles had already made it clear that the cargo movement needs of the war in Viet Nam were sustaining shipping activity at high levels and that rapid attrition in the ranks of A men had pushed their average age to fifty-six. Late in 1962, Harry Bridges went to a Local 10 membership meeting to announce that he had a "Christmas present for the B men." There was applause. Many A men had sons, nephews or relatives on the B List. Bridges climaxed his speech with the promise that sometime early in 1963, the B men would be promoted to the A list. He added that a new B list would be recruited to take their place. The audience's mild elation disappeared with that last bit of news; there were groans but no formal objections.

Regardless of the seeming good humor with which Bridges made the "promotion announcement," the development presented his leader-

3. Paper by T. H. Bryans, "The Australian Waterfront Labor Scene," No.15, p.14, delivered at the International Container Terminal Operators Conference, Oakland, CA. (October 1979).

ship, its supporters in Local 10 and the employers, with the potential of a deep threat. Over five hundred new members would enter the headquarters port of the ILWU at one time, all with strong voice and vote. These men had already shown a willingness to attend local business meetings in large numbers even though they had been relegated to segregated balcony seating. Unlike so many of their elders, they were not awesome supporters of the union's international president. For almost four years they had watched Bridges attend meetings in which he personally frustrated the efforts of rank and file A men to bring B men into the union. An important and additional crisis factor existed because the participation of A men in union meetings had dwindled with their advancing age, to the extent that the meeting quorum was reduced to four hundred. Enfranchising the '59 B List meant that all of Local 10's long-established power relationships were about to be changed. The men who governed the industry were faced with a whole series of unknowns. The Bridges leadership and the employers had the choice of either letting democratic processes naturally determine the course of change or to intervene. They chose the latter.

Harry Bridges attended another Local 10 membership meeting in early 1963, during which he announced the near finalization of plans to open A registrations or "remove the freeze." But he concluded by revealing that there were about a hundred "troublemakers" among the B men who would have to be eliminated from the industry altogether. Previously the plan had been to hold any workers who did not meet existing membership standards in B status for a penalty period. But this action was not even contemplated since none among the B men was awaiting disciplinary trial for any alleged infractions. Bridges' proposal was booed and openly rebutted from the floor. It was probably right after this rejection of Bridges that the three top officials of Local 10, headed by James Kearney, made plans to induct the nearly four hundred B men who had already been processed by the local's own Investigating Committee. Two weeks later they did just that over Bridges' objection. When the ceremony ended, Bridges took the microphone to state that the A registrations of those just initiated would be held up. The secretary-treasurer of the local, Reino Erkkila, was outraged and announced that he had only that day seen, in the PMA offices, the signed and completed registrations of the men who had just taken oath. Bridges returned to the podium once more to state that that action could be "reversed." The next morning the new members of ILWU Local 10 were dispatched to the job as A men. By noon the word spread around the front that their registrations had been rescinded.

The rumor proved true. The next day they were returned to their jobs as B men.

Bridges went back to the local membership for a second try in May. He presented a motion that would allow some higher authority to fire a hundred or so "troublemakers". In support of his own motion he urged that those present not allow "a few to stand in the way of the many." Everyone knew what he meant. Over four hundred were to be denied A status until the membership allowed him to fire four of five score unnamed but already marked men. The motion passed. Hal Yarnow jumped to a floor microphone and called attention to the union's flag in its stand behind Bridges' chair. In six-inch gold letters across its breadth was the statement: "An injury to one is an injury to all." Yarnow was one of the handful who understood that there are no rainchecks in the fight against injustice.

It is doubtful that more than a few longshoremen were yet aware that the B List Committee was the administrative vehicle for carrying out Bridges' motion. There was a perception that Bridges now had the power to fire whomever was on that list and with this came an even deeper disintegration of on-the-job relationships. Which one hundred among the more than five hundred B men were on the list? I, for one, experienced a marked increase in isolation. Not only had I been one of the B representatives, there was talk that I was handicapped by having previously held membership in both the Sailors' Union of the Pacific and the United Auto Workers, both of which were said to have leaderships that Bridges held in disrepute for political reasons. As has already been revealed, I did in fact occupy a place on Bridges' list, but in those weeks there was hardly a B man who was not examining his past to find something within it that might now cause his undoing. Given all the unknowns it is doubtful that many were at peace. Rumors went out that several workers had begun to go daily to the offices of the international union and sit hat in hand waiting for an audience with William Chester, a union official, who it was said, had the power to launder them. Even among those who would surely be deregistered, hope existed side by side with despair. Each of us felt that somehow maybe we would make it and we outwardly conducted ourselves in postures of normalcy. There are experiences far this side of "holocaust" which make the ordinary conduct of European Jews about to enter oven compounds absolutely understandable.

On the same day that we eighty-two received deregistration letters, the hostage A registrations were released. The survivors of the "promotion process" entered the union in an atmosphere of defeat. At-

tainment had come without satisfaction. There was a sense that the position they occupied was actually closer to A-minus and was possibly still revocable. It wasn't hard to conclude that anyone could have been among the deregistered if the new and previously unknown set of disciplinary rules had been applied retroactively to his employment record. "If they want to bad enough, they can get anyone."

The men who governed the industry had won an important victory. They had conducted an offensive and not once had their opposition stepped outside the containment of existing collective bargaining relationships. So successful was their strategy that it was not until 1971 that open rank and file resistance to the mechanization concessions, though still in established channels, resurfaced. The rebellion took the form of the longest longshore strike in American history.⁴ But the eight years between 1963 and 1971 gave PMA members the time needed for the mass introduction of the container moving machineries that are now being roboticized. In 1964, or one year into that eight year period, the first real victims of longshore automation on the west coast became the plaintiffs in *Williams v. PMA*.

III. The Legal Battle

The Pacific Maritime Association made it relatively easy for us disenfranchised longshoremen to organize. It is probable that most of our motivating anger was directed at ILWU officials, but the employers provided an immediate and practical reason for unification. The PMA, as reported in Part I, had denied our claims to unemployment benefits. In order to appeal that denial we were faced with the necessity of hiring a lawyer. The initial step in our self-organizing drive was accomplished in the lines at the unemployment insurance office on the Monday following the Friday that we were fired. Late in July, after we had exhausted all appeals, approximately thirty of us met in San Francisco at the home of one of our number, Cleo Love. Our informal organiza-

4. Late in 1971, ILWU members voted to strike by a 96 percent majority. After 101 days, a Taft-Hartley Act injunction sent them back to work for the "80 day cooling off period." With that time served, 93 percent voted to resume the strike. The basic goal of the ranks was to eliminate the employer's right to bypass the hiring hall when recruiting steady men for container terminal jobs. They twice rebuked their international president for refusing to negotiate an end to this concession. After 30 more days of picketing they accepted the third contract offer brought before them by Bridges but it too contained the paragraph that had given a large portion of control over hiring back to the PMA.

tion and division of labor needed structuring. We formed the Longshore Jobs Defense Committee (LJDC) and elected a steering committee which included James U. Carter, Willie Hurst, Arthur Jackie Hughes, Willie Jenkins, Jr. and Arthur Winters, with Eathen Gums, Jr. and me as co-chairs. This committee became the core group that held the LJDC together for the next seventeen years.

On that first meeting night, after developing a plan to track down and bring in the others who had been fired, the steering committee was assigned the task of interviewing attorneys to represent us at the unemployment insurance appeal hearings. We could not find a pro-union labor law firm that was willing to consider taking our case. None could afford to participate in a suit against a union. We also found that law firms regularly associated with liberal social reform movements could not conceive of representing anyone against "a progressive union like the ILWU." Finally, our search was reduced to tracking down random leads. We were always treated with courtesy. Many took time out of their busy schedules to listen carefully to our story but candidly explained that a case like ours was outside their area of expertise. Others simply could not afford to take on a case with more than thirty plaintiffs who could pay the needed fees only on a contingency basis. We also met some who felt they could not afford to take on an important segment of the power establishment in the San Francisco area. We could understand how easily we could become a liability to our own counsel.

Within five months after our deregistrations we participated in hearings before California Unemployment Insurance Appeals Board Referee, Donald Gilson. Sidney Gordon, a Los Angeles attorney and high school friend of mine, represented the LJDC's thirty-three members. After hearing fifteen days of argument and testimony from both sides, Referee Gilson ruled that the claimants were "not subject to disqualification," that the employers' account was to be charged and our benefits paid. He had been unable to find any "just cause" for our discharge in the explanation given by the PMA.

In the "Reasons for Decision" section of Gilson's ruling he noted several of the conditions surrounding our deregistration that later caused the federal courts to hear our case. Among them he listed the following: we had been subjected to double jeopardy; the JPLRC minutes for July 16, 1963 contained statements by the union members of the committee to the effect that the discharges had been accomplished by use of a new and previously non-existent set of disciplinary rules applied on an ex post facto basis, and that there was no evidence that

we had left the employ of the PMA on a voluntary basis.⁵

The Gilson decision in May 1964 boosted our morale. We had gone through the long hearing without a traumatic expenditure of energy and had won with relative ease. The facts of the case were still fresh in our minds; recounting the story of our discharges had not yet become routine. The victory raised our hopes for success in upcoming court battles. A month earlier in April 1964, Attorney Gordon had filed a complaint⁶ in federal court on behalf of fifty-six LJDC members. It sought relief in the form of job reinstatement as B men, back wages and six hundred thousand dollars in special damages. In addition to listing the PMA and ILWU as defendant organizations, individual defendants were named. Officers of both the employers, association and the union were designated. James Kearney and Harry Bridges were included in the union grouping. While Kearney had tried to save us in his fashion he had also signed the order for our deregistration.

We fifty-six plaintiffs found it difficult to accept the idea that because we were B men at the time of the firings, for legal and technical reasons, we could not seek restitution to jobs that had A status and union membership. The others on the 1959 B List who had not suffered discharge for unjust cause were now secure A men. We had to downgrade our expectations. Victory in the courts could bring only partial relief. Our desperation made that sufficient reason to go on. Then, too, there was no other choice. Even the complaint itself had given us additional tension; our lawyer had not reviewed its contents with us before submitting it to the court.

Shortly after Sidney Gordon filed his second amended complaint with the clerk of the district court, the Joint Port Labor Relations Committee (JPLRC) revealed that they would soon hold a hearing to decide if we should get another hearing. The committee scheduled a second set of appeal hearings to take place in March 1965. Our counsel obtained a restraining order against them but the hearings were conducted even though the order was still in effect. Only one plaintiff appeared, Cleo Love. ILWU counsel Norman Leonard offered to represent him. Love had a heated verbal exchange with Harry Bridges and received yet another affirmation of his discharge. Approximately

5. *In the Matter of: James U. Carter, California Unemployment Insurance Appeals Board Case Number SF-3033*, San Francisco Referee Office, May 14, 1964, at 11-14.

6. *Williams v. Pacific Maritime Ass'n*, No.42284 (N.D. Cal. filed April 14, 1964).

six months later the Joint Coast Labor Relations Committee (JCLRC), on which both PMA President Paul St. Sure and Harry Bridges sat, held a hearing on the basis of the previous hearing and found us guilty as charged.

Our case experienced its first full scale internal crisis in mid-1965. The third amended complaint that had been submitted to the court on our behalf also failed to make a clear statement of our case. Equally disturbing, Gordon once again made a series of statements about the nature of the discharge action without discussing them or his basic theory of the case with us. Frictions grew all the more rapidly because several of the more needy among us were behind in their monthly payments to Gordon; payments were being accepted by him without regularly issuing receipts; and we had not yet formulated a method of raising monies from outside sources. After a disturbing separation from Gordon by all but three of us, the group once again began looking for legal representation. Gordon took action to garnish the wages or attach the belongings of over half of us. We then hired an attorney who specialized in matters of this sort and the harassment ended.

We were absolutely broke, but had recently armed ourselves with several hundred reprints of a two-part article about our case which had appeared in 1964.⁷ By using it as a way of introducing ourselves, it became possible to build a special support group of prominent public citizens under the auspices of the Workers Defense League (WDL) of New York. It was then headed by the renowned labor-civil rights attorney, Rowland Watts, and Robert Joseph Pierpont. With the special help of the late Paul Jacobs, labor and anti-nuclear journalist, the LJDC-WDL Defense Committee was put together. Jacobs got Bayard Rustin of the A. Phillip Randolph Institute and organizer of Martin Luther King, Jr.'s March on Washington to co-chair the committee with Michael Harrington, author of the epochal book, *The Other America*. A dozen more were added to the committee's roster including novelists Harvey Swados (now deceased); Herbert Gold; Nat Hentoff; Julius Jacobson; Rev. William Shirley; Phillip Selznick; Daniel Bell; the late Norman Thomas; Herbert Hill, then Labor Secretary of the NAACP; Norman Hill, then national secretary of CORE; Herman Benson, founder of the Association for Union Democracy (AUD); and Gordon Haskell, then a full time official of the ACLU.

The WDL provided us with the services of Irving Thau of the New

7. Weir, *The ILWU: A Case Study in Bureaucracy* I, II, 3 *New Politic* (Winter, Summer 1964).

York and federal bars and famed civil rights attorney Francis Heisler. Thau came to San Francisco and hired Arthur Brunwasser as co-counsel. Together they filed a fourth amended complaint. It sought relief in two forms; job reinstatement as B men and payment of all wages lost. The late Judge George B. Harris was assigned to our case. He ruled against giving us a trial. He indicated that our complaint had not established a solid argument for trial in civil court and that the National Labor Relations Board (NLRB) was the appropriate agency to approach for relief.⁸ In 1967, the United States Court of Appeals for the Ninth Circuit in San Francisco remanded our case back to the court of Judge Harris for trial. An appeal, written by attorneys Brunwasser and Thau, had successfully turned the tables. Ninth Circuit Judges Pope Hamley and Merrill gave clear instruction to the lower court:

It should be noted also that the appellants assert the complete invalidity of the so-called new rules. Some of the affidavits filed on behalf of the defendants purport to set out what these new rules were. But, if there were an agreement to such rules, they were not adopted in accordance with the requirements of the basic collective bargaining agreement which provided in Section 22: "No provision or term of this agreement may be amended, modified, changed altered or waived except by written document executed by the parties hereto." An examination of the text of the so-called new rules discloses that they do not cover or authorize de-registration of Class B longshoremen; they deal only with the requirements for promotion from class B to A. . . .

Some of the affidavits disclose the powers of the joint committees, referred to, and they indicate the manner in which the plaintiffs became registered and they show that the joint committees found against these plaintiffs and ordered them de-registered. But the basis of the complaint is that the union representatives on the joint committees should not have taken such action in that by agreeing thereto they had failed in their fiduciary duty to all longshore employees.

As indicated above, the complaint alleged that these plaintiffs were in good standing, were guilty of no current infractions, had corrected all past violations of rules, and were entitled to the assignment for work. Nothing in any affidavit negatives the allegation

8. The ruling was preceded by a hearing on our complaint before the court. Our former counsel, Sidney Gordon, was seated at the defendants' table conferring with the PMA and ILWU legal staffs. We never did learn the precise reasons for his presence on that day.

these plaintiffs were arbitrarily and capriciously being penalized for conduct that was not ground for de-registration at the time the acts were committed; that the de-registration was a retroactive application of alleged violations of invalid rules. Furthermore, many of the assertions made in these affidavits are not entitled to consideration under Rule 56(e) which provides that affidavits must be made on personal knowledge, and that the affiant is competent to testify to the matters stated. None of the affiants would be competent to say whether any of the plaintiffs were guilty of any misconduct or rule violation, or that the action of the union members of these joint committees was anything other than a disregard of the union's duty of fair representation.⁹

In the process of instruction, the Ninth Circuit's remand order cited the precedent set earlier in the year by the United States Supreme Court's *Vaca v. Sipes*¹⁰ decision:

The Argument of the Supreme Court is a very cogent one. For instance, the Court noted that the Board's general counsel had unreviewable discretion to refuse to institute an unfair labor practice complaint. Therefore the injured party having a valid claim based on denial of fair representation could not be assured of a remedy if the courts were deemed ousted of their traditional jurisdiction in such cases. At any rate, this reason given by the trial court for denying jurisdiction is demonstrably wrong in view of *Vaca*.¹¹

The employers and the union appealed the Ninth Circuit's reversal and remand of Judge Harris' summary judgement against us to the Supreme Court. The high court refused to review their appeal.¹² Despite our victory at this point, our opposition was soon able to frustrate again our efforts to obtain a trial. Shortly after we organized the LJDC-WDL Defense Committee for the purpose of making our case known to the public and raising monies to cover legal costs, Harry

9. *Williams v. Pacific Maritime Ass'n*, 384 F.2d 935, 939 (9th Cir. 1967).

10. 386 U.S. 171 (1967).

11. *Williams v. Pacific Maritime Ass'n*, 384 F.2d at 937-8. Five of the men fired in 1963 had taken their cases to the NLRB. A local San Francisco trial examiner Herman Marx, ruled that their deregistrations were invalid and that they should be returned to their jobs as B men. On December 5, 1965, John H. Fanning, Gerald A. Brown and Sam Zagoria, as general counsel for the NLRB, reversed the Marx ruling in favor of the PMA and ILWU. *Accord*, *Pacific Maritime Ass'n (Johnson Lee)*, 155 NLRB 1231, 1234, (1965).

12. *Williams v. Pacific Maritime Ass'n*, *cert. denied*, 390 U.S. 987 (1967).

Bridges sued most of the committee's members for libel. Bayard Rustin was particularly singled out. The action cited a written appeal for funds sent out by the committee mentioning Bridges' role in the discharges. The suit was withdrawn in 1969, less than a week before it was to go to trial.¹³ It cost us a great deal. Time and serious illness had eliminated attorneys Thau and Heisler from participation in our case. For some time Arthur Brunwasser had been acting alone on our behalf and the libel suit made it impossible for him to devote time to the main case. In 1965, all the plaintiffs signed individual contracts with him. He was to receive payment for his efforts only if we won. In the interim we were to pay all legal fees and expenses. In 1969 he had already worked for us for four years without compensation. The libel action had cost us more than a year's time at that point for it would be three years before we would again be able to raise the money necessary for trial in the district court.

In the years just prior to our 1974 trial before Judge Harris, our case came under a unique handicap. The attorneys for the PMA and ILWU went before the court and were successful in getting an order that struck the names of individual defendants from our complaint. At the same time the international union established that ILWU Local 10 was a third responsible party of their side. Thus the membership was obligated to pay a share of the legal costs incurred, and if we prevailed, a portion of the settlement. We not only needed the support of the rank and file upon our possible return to the docks, but during the period of legal battle as well. Additionally, a majority of us still had relatives as well as friends working the ships. This all added up to increased strain in the case. Before the litigation was over, longshoremen in locals up and down the west coast would be assessed for the legal costs incurred by the union defendants because of the Bridges' leadership.

Time and polarization of differences on national political issues in the late 1960s and early 1970s had caused a disintegration within the LJDC-WDL Defense Committee. It was reorganized. We got James Baldwin, Kay Boyle, Staughton Lynd, Phylliss Jacobson, Hal Draper, Clancy Sigal, Dan Georgakas, Stanley Aronovitz and others to fill the vacancies created by the deaths of Norman Thomas, Harvey Swados, and San Francisco civil rights leader Dr. Thomas Burbridge. A new fund drive was successful. The time for trial preparation had arrived.

13. See Weir, *The Retreat of Harry Bridges*, NEW POLITICS (Winter 1969) reprinted in abridged form in AUTOCRACY AND INSURGENCY IN ORGANIZED LABOR (Hall ed. 1972).

Early in the long depositions period, the book, *Harry Bridges: The Rise and Fall of Radical Labor in the United States*, was published and immediately received prominent display in San Francisco book stores. Its author, Professor Charles Larrowe of Michigan State University, was already considered an authority on the ILWU because of an earlier book comparing daily longshore hiring systems on the east and west coasts of the United States.¹⁴ The later book on Bridges contained a ten page discussion of our case. Despite Larrowe's statement that I had been victimized by Bridges for political reasons, the entire section was filled with part-truths that made it totally misleading, a tool that could only misinform people who had no way of checking the accuracy of his reporting. Worst of all, he dressed his discussion of the other men who were fired in just enough fact (given him by ILWU staff) to give it the ring of an informed source. His assessment of the firings ended with the sentence, "[i]n almost all of these cases, the men admitted the charges and accepted the verdict."¹⁵ Regardless of intention, the statement that any of our men confessed to the allegations against them fails to reflect reality. In truth, some of our men, for example, had not only admitted late payment of dues, but had confronted their accusers with a counter-offensive: "How is it that lateness of dues payment for which I have already paid the fine has suddenly become a rule, a rule that can be retroactively applied and a rule whose violation brings unappealable discharge?"

Let us take another example, that of Willie Hurst. During his first year of employment on the waterfront a banana dock walking boss fired the entire gang in which Hurst was working, for drinking on the job. Before being cited by the Port Labor Relations Committee, Hurst went to Local 10 president James Kearney and explained that the gang had been fired for the remainder of the day because of the drunkenness of one man. Kearney easily confirmed that Hurst was a lifetime "teetotaler," but advised him not to testify to the facts when the case was heard. If Hurst were to accuse the particular A man in question of being drunk, and the cause of the firing, he would probably never get promoted to A status. Kearney was right. Hurst was given the penalty for first offenders, thirty days off the job without pay and was told to avoid further violations. He served his time and heeded the warning. Almost three working years later, in 1963, he was penalized a second

14. C. P. LAROWE, *THE SHAPE-UP AND THE HIRING HALL*, (1955).

15. C. P. LAROWE, *HARRY BRIDGES: THE RISE AND FALL OF RADICAL LABOR IN THE UNITED STATES*, 364 (1972).

time for the same incident, but this time he was given the sentence reserved for three time offenders, discharge. Yes, in a sense he did admit the charges, but only if one is operating without regard to context. And, in no way did Hurst or the others accept the verdict. Larrowe's book served to obscure the entire question of the new rules and the escalation in the punishments connected with old rules often twice applied.¹⁶

Our federal case, *Williams v. PMA*,¹⁷ came before the court sitting without jury on January 14, 1974, and continued until July 3rd, with more than sixty days of live testimony. The trial revealed a number of facts in the case that startled us. One such example occurred when PMA officials testified that the special rules by which we were discharged did not originate in any of the joint PMA-ILWU committees, but in a separate session of top officers and legal staff. It was then that testimony revealed how the special rules were not adopted by the Joint Coast Labor Relations Committee until after the appeal hearings in July 1963, and remained in effect only a few short weeks. To this date they have never been revived.

Judge Harris sat through testimony of this sort as well as routine procedural matters without any reaction. We hoped that this was part of his professional demeanor but it was about this time that a number of the plaintiffs began to wish that the case had been heard by a jury. It also bothered us that Judge Harris seemed to be in awe of head ILWU counsel Richard Gladstein. Harris had been one of the judges involved in the early post-World War II (McCarthy) era during which the federal government made several "witch-hunt" attempts to deport Harry Bridges. Gladstein was Bridges' main counsel when the bulk of San Francisco's power elite still considered the ILWU president a threat. We plaintiffs wondered what effect the past might have now that Bridges was in great favor as a "labor statesman" and member of the Port Commission.

For me, one of the greatest shocks at trial was supplied by the long opening statement given by head PMA counsel Richard Ernst. The opening statement of our lawyer, Arthur Brunwasser, had focused on

16. For further detail see the review of Larrowe's book by Clancy Sigal, then a stranger to the case, in *The New York Times Book Review*, January 7, 1973, at 3; the discussion by Bridges, *The New York Times Book Review*, February 18, 1973, at 32; followed by my own discussion, *The New York Times Book Review*, May 13, 1973, at 34.

17. Civil suit No.42284 in the court of Judge George B. Harris.

the specifics of the discharges and the absence of all fairness in the process. Ernst laid a foundation for the case on grounds vastly different from Brunwasser's. He took an openly political approach. He recounted how, in 1919, the waterfront employers had broken the waterfront unions, initiating a fifteen-year period of oppressive experience by long-shoremen. The strikes of 1934 re-established the union and ushered in a fourteen-year period of militant confrontation between the union and employers. After the strike of 1948, Ernst pointed out, the employers embarked on the "third period." They saw that the union was maturing and so began an era of increased trust and collaboration. Around 1958 they felt that the union had made so much progress that its members could participate in the process of selecting new men for the industry. Four years later the witnessed development of maturity within the union caused the employer to involve the union in the firing process as well. He then pointed out that we plaintiffs were the first product of both maturity-proving developments.

Ernst's opening statement developed full direction on January 23 and continued, with routine interruptions, over several days. He made the logic of his case absolutely explicit; if the judge ruled for the defendants he would be in the company of a long list of great social engineers such as Wayne Morse and Clark Kerr who helped structure an intricate and operational working arrangement between a large employer and union in a vital industry. If, on the other hand, the judge ruled for the plaintiffs he would be destroying labor peace. Contrary to my first impression, the counsel for the PMA was not wide of the mark, he was right on it. He was operating on the premise that had increasingly directed the development of labor policy in all three branches of our government since passage of the Taft-Hartley Act: the promotion of "labor peace" through containment of the work force via collaborative contractual arrangements which essentially substituted arbitration for any concerted action by the workers. According to Ernst, our deregistrations symbolized such an accomplishment and it should not be tampered with.

The last shocking segment of the trial, possibly for all participants, came on the last day testimony was presented. Attorney James A. Carter, former PMA lawyer and legal staff member of the Port Labor Relations Committee (JPLRC) at the time of the 1963 deregistrations, gave the following testimony under cross examination by Arthur Brunwasser:

I had heard¹⁸ that Mr. Weir was one of the persons that was being deregistered; that it was very definite that he should be deregistered; and there was simply no doubt in my mind, and I believe in the minds of the other people who worked on the case, that the feelings were very strong that Mr. Weir should be deregistered. . . .

Well, what I heard was that Mr. Weir was opposed to the M and M agreement, that he wanted to make work for people and stop the use of labor saving devices and things; that he was interested in more longshoremen, et cetera; and that that ran counter to the prevailing views of Mr. Bridges. I think it was more—what I heard was a philosophical thing—presumably, this lost case had been made public—that he was philosophically opposed to the concept of M and M; that he was of the old fashioned union school that felt you ought to have a lot of people out there working, and you shouldn't have labor saving devices.¹⁹

Finally, and only as the trial neared conclusion, the court got its first opportunity to understand not only the major reason behind the discharges, but why we were being pursued with such hostility. Earlier in the trial the court had heard testimony by Curt Johnston, then president of ILWU Local 13 (Los Angeles), that a former San Francisco employee, Robert Hall, had told him how “eighty-two had been fired just to get Weir.” Hall subsequently testified that Johnston had fabricated the story. Later toward the end of Carter's testimony, an explanation very similar to Johnston's was offered:

But what I did hear was that the—that a decision was made at a very high level—and those words may not have been used either—but I can read. . . shorthand—but that a decision had been made to deregister Mr. Weir; and that in order to facilitate that, I suppose, it was decided to deregister other people at the same time.²⁰

We had heard this theory several times, twice directly, from ILWU staff employees who were disillusioned with Bridges, but because they were still in the employ of the union their depositions proved

18. It had been established in earlier testimony that the source was PMA staff representatives with whom Carter was working at the time.

19. *Williams v. Pacific Maritime Ass'n*, *Reporters Partial Transcript*, July 3, 1974, at 10-11, 12.

20. *Id.* at 52.

fruitless. Nevertheless, to have heard the theory early on had value. It forced us to think through our own analysis of the ILWU-PMA strategy with greater care. There was probably no way that we would ever be able to prove or disprove the theory but its persistence showed us the potential for vindictiveness with which we were dealing. We agreed with the political analyses put forth by Herman Benson and Gordon Haskell of the Association for Union Democracy: Bridges represented a highly developed bureaucratic conservatism that retaliated full force against even the slightest potential of opposition, no matter how far in the future it might take to materialize.²¹

On August 31, 1975, Judge Harris ruled for the defendants. The defendants had won based on the argument that B men were probationary employees and not union members. Yet, Bridges' handpicked successor as president of the ILWU, James Herman had become president of an ILWU local union in the 1960s as a B man. In a post-trial meeting for the plaintiffs our attorney told us that the judge had not even written the decision. Instead, he had taken the closing brief of PMA counsel Ernst, transferred it to court stationery and applied his signature. The content of the decision offered an even more detailed interpretation of the political conflict on the San Francisco waterfront:

43. Factions developed within Local 10 on the subject of promotion of the limited registration Class B men. One group included Selden Osborne, Asher Harer, Hal Yanow, Frank Stout, James Kearney and others; it favored the granting of union membership to the limited registration class B men and their dispatch with the fully registered Class A longshoremen, even though this would be in violation of the contract and the law. Another faction included Harry Bridges, William Chester, Robert Rohatch, Tommie Silas and others; it was of the opinion that the union should comply with the contract with the PMA and promote only on the basis of joint action between the ILWU and the PMA.²²

There was a quarter truth to Ernst's (Judge Harris') interpretation of the political fight within Local 10. The first group had all individu-

21. H. Benson, *Harry Bridges' Own Witch-Hunt*, 13 UNION DEMOCRACY IN ACTION, (Sept. 1964); Haskell, review of Charles P. Larrowe's biography of Harry Bridges, 4 UNION DEMOCRACY REVIEW, (Summer 1973).

22. *Williams v. Pacific Maritime Ass'n*, Proposed Findings of Fact and Conclusions of Law Lodged by Defendants, PMA, ILWU, Local 10. Civil No.42284 GBH at 14-15 (Mimeograph of original).

ally, at one time or another, taken the floor of a union meeting to oppose our deregistration but they had never operated as a faction. It had been many years since any who opposed Bridges had felt secure enough to organize against his ideas in concert. It was rather shrewd of Ernst to wait until the very end to offer this interpretation and thus leave no chance that our side might begin to dispute his distinctly political interpretation.

After the setback at trial, we once more appealed to the Ninth Circuit Court of Appeals, with very different results. The political climate in the entire nation had changed markedly in the decade since the appellate court had ordered that we be given a trial. Oral argument on our appeal took place on February 5, 1979. To get there had taken yet another fund drive with donations from many well wishers. Once more we filled the court room to capacity but it did not appear to have any visual effect on the judges.

The argument took little more than two hours. We left with an uneasiness we could not shake. We felt it would be impossible for the judges to do ample research in the more than twenty cases of printed matter which constituted the record in our case. Even more disturbing, we had not heard them ask what we considered the substantive questions in the case.

Judges Duniway, Kennedy and Bonsal handed down their opinion a year and two days after taking argument.²³ Their conclusion was,

We believe that the district court erred in concluding that appellants failed to exhaust required grievance procedures. We nevertheless affirm on the merits because appellants have not demonstrated that PMA or ILWU or its constituent local breached either a duty of fair representation owed to appellants or the terms of the Pacific Coast Longshore Agreement.²⁴

We were sixteen years down the road when hit by this decision. No longer were we in awe of the court. Underneath their robes these three men wore pants that they got into one leg at a time just like other mortals. The gap between the letter of the law and the way life is actually lived was so wide for them that an "Alice in Wonderland" logic dictated the terms of their decision. They agreed that the ILWU and the PMA had denied us due process, but ruled there was no evidence

23. *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321, 1334 (9th Cir. 1970).

24. *Id.* at 17.

that the union had failed in its duty to represent us fairly. Yet due process is the forum or vehicle that makes representation possible. The two are totally interdependent. There cannot be one without the other. For the justices, unjust means could somehow be used to arrive at a just end.

From beginning to end, a pivotal area of the law which was applied to our case was whether or not the acts of the defendants had been legitimized by the collectively bargained agreement. In 1967, one of the major reasons for the Ninth Circuit's reversal of Judge Harris' summary judgment against us was that the new rules used to discharge us had not been arrived at via the collective bargaining process. Contrary to this, Judges Duniway, Kennedy and Bonsal held that the new rules had been negotiated into existence by the two parties on the Joint Port Labor Relations Committee (JPLRC). The July 16, 1963 minutes of the JPLRC cited earlier here were still among the case exhibits. They revealed that the union members of the committee, who would have had to be half of the negotiating effort, were protesting our discharges because the new rules had not been adopted by the bargaining process.

In an example of "doublethink," the decision of the Ninth Circuit also held that the new rules were actually not new at all. The court observed that we appellants knew, for example, that our "dues" should be paid on time and that fact was not changed by the creation of a new, additional and maximum disciplinary penalty. In fact, the addition was legitimate for them because the well known Section 9 of the 1958 rules covering deregistration contained an eleventh "or, for any other cause" rule.

The underlying rationale of the judges on this aspect was not hard to determine: the new mechanized technology that was being introduced to the industry in the early 1960s demanded the creation of a "permanent work force" composed of high caliber individuals; by applying the new rules (or penalties) the employer and the union were setting the standards necessary to the needs of the new era; the old era in which all jobs went through the hiring hall was now in the past; the deregistration of people who had a propensity for unreliability represented an imperative updating whose correctness and success was indicated by the fact that eighty percent of the 1959 B men met the higher standards. The final block of reasoning in the stone wall erected against us by the courts was tragically laughable: because, in a hostage taking operation, a large number escaped being taken showed them that none of those taken were hostages.

On the surface, the court was refusing to see that our discharges were part of a conflict but, below the surface, other factors were at work. The unjust decision of the Ninth Circuit unknowingly gave support to Professor James B. Atleson's thesis on the values underlying decisions on labor cases by the courts, "[t]he belief in the inherent rights of property and the need for capital mobility, for instance, underlie certain rules, and some decisions turn on the perceived superior need for continued production or the fear of employee irresponsibility."²⁵

We appealed the decision to the Supreme Court. There were two court decisions against us and only a narrow margin of hope, but the majority of the plaintiffs needed their jobs back as much then as we did the day we were fired. Unfortunately, though not surprisingly, it had become harder to raise the money to cover legal expenses and, by 1980, six of the plaintiffs had died. Others had moved in order to obtain employment. Some, like Manual Nereu, were as far away as Saudi Arabia. Mario Luppi had returned home to his family's village in Italy. I had been living in the Los Angeles harbor area for five years and had resided in Illinois during the previous eight years. Communication was more and more difficult to sustain but the necessary mobilization was made easier when Teamsters for a Democratic Union, Independent Skilled Trades Council, Union Women's Alliance to Gain Equality, *The Bell Wringer*, National Labor Law Center of the National Lawyers' Guild and Association for Union Democracy offered to file a friend of the court brief on our behalf.²⁶

The brief authored by Burton Hall stimulated new interest. It gave added emphasis to the arguments made by Attorney Brunwasser. For example, it showed that the written job dispatch rules provided us until the day of our discharge ended with the capitalized statement: "THERE ARE NO OTHER RULES." The brief by attorney Hall also contained what for us was a new idea; the union's agreement to deregister us was a bill of attainder:

In 1963, at the time that Local 10 and ILWY agreed to the new "standards" and agreed, also, to deregister those "B men" who failed to meet those "standards" because of conduct prior to their

25. J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW, 2 (1983) (Atleson is a professor of law at State University of New York, Buffalo).

26. Burton H. Hall, Attorney for Proposed *Amici Curiae*; of counsel, Staughton Lynd.

adoption, the identities of those persons who would thereby be de-registered were either known or were easily ascertainable from records in the bargaining representative's possession.

Thus it was known or could easily be learned from the records that Graves had been found guilty of an instance of intoxication in 1960 and had been suspended for 30 days as punishment. It was known or could easily be learned from the records that Cafeterio had, however innocently, committed a Low Man Out violation in 1962 of more than ten hours by failing to add hours to his time for his unavailability on Sunday, August 12.

The decision to deregister the class of persons who were shown by the records to have committed any violations of the "standards" was, in short, a bill of attainder.²⁷

The Supreme Court, in its October 1980 term, denied all briefs filed for the plaintiffs. We were finished. It felt just that abrupt. The case had been a central activity half our adult lives and a period of adjustment was forced upon all participants.

IV. Epilogue

The previous sections represent only one small portion of the *Williams v. PMA* story. The events profoundly affected all of our lives. Some among us were more fortunate than others in rebuilding work careers and keeping our families together after the discharges. The story of every man and his family deserves telling and if told would reveal that anguish can develop strength as well as diminish it.²⁸

27. In the Supreme Court of the United States, October Term 1980, *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321 (9th Cir. 1980), *cert. denied*, 449 U.S. 1101 (1981). Motion of Teamsters for a Democratic Union for leave to File Brief as *Amici Curiae* in Support of Petition for Certiorari and Brief of *Amici Curiae* in Support of Petition for Certiorari, p.16.

28. The names of all plaintiffs are: George R. Williams, William Jones, Paul May, Eathan Gums Jr., Edgar J. Dunlap, Walter L. Robinson, Frank Nereu, Louis T. Lacy, Leroy J. Provost, Roger W. Fleeton, Robert E. Birks, Anthony Melvin Jr., Oliver Geeter, Antonio S. Cafeteiro, Edward Reed, Albert W. Roberts, Percy Fountain, William J. Hurst Jr., Willie C. Merritt, Mack Hebert, Manuel Neureu Jr., Arthur G. Winters, Frank Giannino, Stanley L. Weir, Fred Hayes, Willie J. Whitehead, Rhody Adams, Mario V. Luppi, Arthur L. Hughes, Jeremiah Richards, Cleo Love, Louis J. Richardson, Charles J. Johnson, Reginald W. Saunders, Willie Jenkins Jr., Willie D. Palmer, Conway T. Hudson, John T. Leggett, Alfred Straughter, Thomas Nisby, Timothy E. Carter, James U. Carter, Melvin Kennedy, Henry Imperial, James Lang-

We surviving plaintiffs make no claim to objectivity, and that applies as well to the opinions expressed in this article. Like all who are party to a violent fight, with many casualties, we will never cease to be partisan. The human costs have been high in many ways. One of the most oppressive aspects of our experience with the law was our inability to afford the financial costs. In our view, any legal action in which the attorneys are to be paid on a contingency basis is in deep trouble if it lasts more than a few months. A case with the workload the size of ours quickly became destructive to our lawyer's personal life and professional image. It is true that in the beginning there was gratification by the very nature of the case. But we witnessed the coming of those times when other attorneys would loudly call across court building lobbies with derisive guffaws: "Hey, you still have that big five (ten, fifteen) year old law suit?" We watched as our attorneys overworked without pay. The greater their resentment and our guilt, the more we felt like charity cases and lost client control over direction of the suit. This resulted in the destruction of friendships and the development of deep doubts.²⁹

ford, Johnny J. Cherry, Ellis E. Graves, James Green, Ulysses Hawkins, Theodore Toliver, Lawrence Johnson, and Herman Crawford.

29. Over the years substantial changes were made in the theory of our case and its presentation to the courts. The shift was away from a focus on the political motivations which had led to the discharge, to a concentration on the lack of just cause—yes, we had been wronged, but an analysis of why was missing. This weakened and undercut the case of the plaintiff who had most been involved in the politics of the industry as an elected representative of the B men, myself. In turn, all of us felt that this served to undercut the entire case. The change became documented in our appellants reply brief to the Ninth Circuit Court: "Similarly, defendants set up a 'strawman' in the guise of one of the fifty-one of the plaintiffs, Stanley Weir, and emphasize his philosophical musings of defendants' intention." *Williams v. Pacific Maritime Ass'n*, 617 F.2d 1321 (9th Cir. 1980). Appeal from a Final Judgment of the United States District Court of the Northern District of California, Appellants Reply Brief No. 77-1398, at 4, served Oct. 11, 1978.

The "philosophical musing" referred to an explanation of how the fight of the B men for union representation, while not an organized factional war, was automatically antagonistic to the mechanization program of Harry Bridges and his eager acceptance of the employers' automation plans.

When the time came for filing an appeal for certiorari with the United States Supreme Court we gathered together closely once more in the Bay Area. The LJDC steering committee was again able to hold meetings. About the time that the Teamsters for a Democratic Union began to develop a brief in support of the issues in our case, and in reaction to criticism from long time supporter Sam Bottone, we again began to act like full fledged clients. We realized it was our last shot and that we would have to

There are several areas in which some generalization of our experience can be made. We would not have filed suit in 1964, had we known that the action would take so many years. At the same time, by 1964, the only alternatives to filing suit was to walk away in submission, and that was unthinkable. That we put up a good long fight is a source of pride. It is gratifying to hear, as we still do from former co-workers on the front, that the men of the four B lists recruited after our discharge got much better treatment from the ILWU and PMA because of our suit. Another outbreak of resistance after ours, especially a second lawsuit, might have triggered alliances and the reversal of bureaucratic victories.

A statement commonly heard among LJDC veterans is that we stuck together through it all, and, as a result, we formed unusually strong bonds of friendship and experienced considerable personal growth by getting an inside look at the way law actually works in our land. We have seen that labor law is a special segment of the total body of American common law. In worker-employer-union conflicts, the worker often does not have due process protection as guaranteed by the Constitution and Bill of Rights. Labor law legitimizes the loss, makes it legal and provides a framework for the application of private government in the workplace by employer rules as modified by employee resistance.

live with the outcome every bit as much as our attorney. We asked for a meeting with counsel. After several refusals to even entertain the idea of meeting with us to discuss any questions we might have, we sent a formal request, by letter, for a meeting. After all briefs were filed with the court, Attorney Brunwasser sent the committee a twenty-one page letter with a copy to every plaintiff. It attacked me and made strong inference that I was guilty of the charges alleged by the employer and union, explaining that while this had been known for some time it was not brought out because I was the best fund raiser in the case. Prior to receipt of the letter not a particle of distrust had ever entered my mind. We of the steering committee had always played the role of liaison with and defender of our attorney in relation to the rest of the LJDC membership. The other members of the steering committee immediately responded with a letter that rejected any validity in his accusations. In turn, they too were cut off as if for increased disloyalty and personal affront.

The problem between us clients and our attorney of record got escalated, very probably without hope of solution, and will ever remain a source of grief and loss. We have no way of making an accurate unbiased analysis of its causes. But as we look back to learn what we might have done differently, one thing is certain: over the years we should have given more recognition to the labors of Arthur Brunwasser while he was in the process of providing them. Acknowledgment is an essential form of nutrition. Shakespeare reminds us by exaggeration as the good Kent responds to Cordelia in *King Lear*, "[a]cknowledged is o'er paid."

I agree with the idea expressed in varied contexts by labor attorney Staughton Lynd that the filing of a lawsuit is not by itself an effective way to fight and often creates an artificial context in which facts become distorted.³⁰ It is more effective to use the lawsuit as a back-up action and only as a last resort.³¹ We could have pursued a return to our jobs far more effectively with continued organizational support and with some form of political-organizational support from the general public, particularly in the Bay Area community. We feel certain our story would be quite different if we had received even the most indirect support from the membership of ILWU Local 10, and especially if there had been the development of open resistance to containerization. In the absence of direct support of any kind, we needed far more backing from public sources than we were able to generate and maintain.

The availability of the documents in our case to public scrutiny and research is a positive development.³² Still unnoticed anywhere, for example, is the fact that by simple self-interest and self-preservation B men became critical of Harry Bridges because of the conservatism of his leadership and his eager acceptance of the employers' new technology program. Quite logically, those who cast their lot with the B men or came to their defense both from inside the industry and from the public, were persons who were viewed as having a more radical world view than Bridges; probably a very threatening experience for a labor official whose entire method of operation historically had been based upon presenting himself as a leftist.

The largest and most important part of the fight continues on the job in every port. More than half the 15,000 registered longshore jobs that existed in 1963 have been automated out of existence. We were the first mortalities in an ongoing liquidation. There is not a day in

30. LYND, *THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS* 146-7 (1982).

31. *Id.*

32. The Office of the Clerk of the United States District Court, Northern District of California, in San Francisco provides access to case files stored in San Mateo, California. Taped interviews of approximately thirty of the deregistered longshoremen conducted by Elinor Randall Keeney will soon be deposited with the Regional History Office of the Bancroft Library, University of California at Berkeley. This library contains extensive interviews with the late Paul St. Sure, former PMA president. An interview of Stan Weir by Paul Buhle is on file in the Oral History Department, University of California at Los Angeles. Numerous documents on this case collected by the plaintiffs have been archived in the library of the Center for Socialist History, Berkeley, California.

which the remaining seven thousand rank and file west coast dockworkers do not have to resist. It is they who need allies, primarily in other industries and unions, but within the informed public as well. Plans for the "Second Containerization Revolution" by computer controls are emerging from the drawing boards in greater numbers. The number of options available have diminished for both sides, particularly for the workers, who now have much less faith in established grievance solution channels.

Communications Revolutions and Legal Revolutions: The New Media and the Future of Law

M. Ethan Katsch*

Introduction

Our age is noteworthy for the development of television and computers, media that transmit information over vast distances at electronic speed. In the mid-1400s, Gutenberg's invention of printing by moveable type was perceived to be equally miraculous and quickly became a powerful societal force.¹ Francis Bacon wrote that "we should note the force, effect, and consequences of inventions which are nowhere more conspicuous than in those three which were unknown to the ancients, namely, printing, gunpowder and the compass. For these three have changed the appearance and state of the whole world."² One rarely-noticed way in which printing changed the world was through its influence on law. The spread of printing led to fundamental changes in legal doctrines, legal institutions, legal values and attitudes about law.³ Printing technology helped create the modern legal order and has continued to be a major influence upon it.

We are living in an era in which the new electronic media are joining the traditional media of print, writing and speech and taking over some of their functions. This article is an exploration into the effects of these new communication technologies on law. Marshall McLuhan once noted that when "a new technology comes into a social milieu it cannot cease to permeate that milieu until every institution is saturated."⁴ The following analysis suggests that, at least as far as law is concerned, McLuhan is probably correct. The new media can be expected to be used in ways that will cause a transformation in the legal order that has developed in the West in the last five hundred years.

To understand the depth of the changes likely to be caused in the

* B.A. New York University; J.D. Yale Law School; Associate Professor, Dept. of Legal Studies, University of Massachusetts at Amherst.

1. E. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* (1979).
2. F. BACON, *NOVUM ORGANUM*, APHORISM 129 (1620).
3. See Pt. III, notes 35-81 and accompanying text.
4. M. McLUHAN, *UNDERSTANDING MEDIA* 161 (1964).

future by the electronic media of video and computers, it is instructive to pay some attention to the past and to examine how, over the last five hundred years, the technology of print was a major force in the shaping of the modern legal order. Such a perspective will provide insight into the significant differences between print and the new technologies and provide a conceptual model for understanding how communications in general are an influence on the legal process. This essay begins with a discussion of law and of media, in order to bring into a sharper focus frequently neglected aspects of each that are essential to the analysis to follow. Several theories which have been suggested to explain how the form in which a society communicates information can influence the values and institutions of that society are then discussed. These theories will then be applied to law, first to the period following the invention of printing, our last communications revolution, and then to the new media. The purpose of this endeavor is not merely to identify or predict specific changes, but to develop a model for understanding the process of change and how it occurs.

I. A Brief Overview of Law and Communications Research

Several blind men attempt to investigate an elephant. One who has the trunk says, 'It is long and soft and emits air.' Another, holding the legs, says 'It is massive, cylindrical, and hard.' Another, touching the skin, 'It is rough and scaly.' All are misinformed. All generalize from partial knowledge.⁵

Law, like the elephant, can be viewed from various angles. Unfortunately, research into the influence of communications media on law has been as myopic as the elephant examination performed by the blind people. Parts of the relationship have been studied, but other areas remain unexplored. As with the various partial examinations of the elephant, the compartmentalized research which has been done has obstructed the development of a complete picture of how new communications technologies can change the nature and functions of the process of law in a society.

Analyses of law and the new media have focused almost exclusively on the new media's impact on either legal doctrines or legal insti-

5. R. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* 9 (1972).

tutions.⁶ The vast majority of such studies, unfortunately, are likely to reveal only short term or surface changes in law. To identify changes that are likely to be more long lasting⁷ and affect fundamental aspects of the process of law, it is necessary to define law more broadly than is generally done by communications researchers. As the following brief discussion indicates, there is more to the process of law than its rules or its institutions. The deepest change in law is likely to come about by the new media's impact on legal values, on individual habits of thought and on the social conditions that make law necessary for the resolution of conflict.

The initial impact of a new communications medium on law will be in the development of new rules to resolve problems caused by that medium. Today, "media law" is a growth area because attempts are being made to control the use of the new media. New modes of communication inevitably create problems and conflicts which the legal system is called upon to resolve. Thus copyright law developed after the invention of printing,⁸ wiretapping laws followed shortly after the invention of the telephone,⁹ and laws of privacy were enacted as a result

6. The August, 1983 issue of the *Index to Legal Periodicals* contains a typical listing of computer law articles. Of nineteen citations in the "computer" category, ten concerned legal doctrine, e.g. "Legal Protection of Computer Software," and nine related to legal institutions, e.g. "New Age of Computers for your Law Office." The same dichotomy can be found in the "Radio and Television" or "Technology" listings.

7. Kenneth Boulding has reminded us that "predictions into the future, once we leave the realm of celestial mechanics, are notoriously unreliable. . . . Nevertheless, predict we must, because all decisions are about the future. When we are considering a rather stable and slow-moving aspect of society like the law, we have to think about quite long-run futures." Boulding, *Economics, Evolution, and Law*, in *LAW AND THE AMERICAN FUTURE* 30 (M. Schartz ed. 1976).

8. Copyright did not exist in the age of scribes and manuscripts. "To seek the origin of Copyright in times prior to the invention of Printing, would partake more of curious research than of useful investigation." LOWNDES, *AN HISTORICAL SKETCH OF THE LAW OF COPYRIGHT* 1 (2nd ed. 1842). The earliest copyright statute is the Statute of Anne in 1709.

The inevitability of a need for protecting published works after Caxton introduced the printing press into England in 1476 makes it almost certain that, in a manner not entirely clear, members of the book trade had developed some form of copyright prior to receiving their charter of incorporation in 1557. The grant of a royal charter, however, gave added dignity and powers which the company used in giving definitive form to its copyright.

L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 4 (1968).

9. "Within ten years after the invention of the telephone the American press

of the growth of newspapers.¹⁰ The studies of these developments share a common approach. They look at or propose new legal doctrines—or rules of law—and relate these regulatory changes to social or technological change. They examine court decisions and statutes and attempt to evaluate the costs and benefits of applying old categories or of generating new ones.

The second large body of literature concerning law and communications focuses on the employment of new media within legal institutions.¹¹ Much of this literature describes experiments in which the new media are used in some novel way. Some research has attempted to assess whether these new uses will affect traditional legal policies.¹² In general, however, very little is currently known about what it will mean in the future to begin employing the new media in novel and widespread ways within our legal system.¹³

featured stories of private telephone tapping to steal stock quotations or newspaper stories, and police listening-in during criminal investigations." A. WESTIN, *PRIVACY AND FREEDOM* 338 (1967). In *Olmstead v. United States*, 277 U.S. 438 (1928), the Supreme Court, with Justices Brandeis and Holmes dissenting, held that a wiretap was not a search and seizure covered by the Fourth Amendment. Forty years later, in *Katz v. United States*, 389 U.S. 347 (1967), the Court reversed itself on this issue. The first federal statute covering wiretapping was section 605 of the Communications Act of 1934.

10. R. SMITH, *PRIVACY* 3 (1979); *See also* Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

11. *See supra* note 6.

12. *See, e.g.*, Brakel, *Videotape in Trial Proceedings: A Technological Obsession?* 61 A.B.A. J. 956 (1975).

13. The new media's impact on legal processes is usually looked at both narrowly and with a short-term perspective and for this reason empirical evidence of dramatic shifts, even if they were occurring, would not be available. Probably the most discussed aspect of the new media concerns the use of television cameras in court. Yet, there are no studies on the effect of television coverage on viewers or how the public perceives televised news stories about courts. George Gerbner has written "no meaningful research has yet demonstrated the validity of arguments for television trials or the benefits from trials already televised." Gerbner, *Trial By Television: Are We At The Point of No Return?* 63 JUDICATURE 418 (1980). More importantly, the cumulative effect of the use of video technology within the institutions of law has not been a focus of research. What Samuel Brakel noted in 1975 is probably still true today. He wrote, concerning the use of videotape in trial proceedings, that:

The effects are many and of various levels of significance and inevitability. While the precise ramifications are speculative it is not excessive to say that the overall impact of the video technology is of potentially revolutionary proportions. The fact that proponents or students of the technology have not identified, let alone examined and evaluated, most of these effects

The main defect with current research is its narrow conception or definition of law. Law is more than a set of rules or institutions. Viewed more broadly, law is a social process with values and philosophical attributes which have evolved into its current form over the course of several centuries. Law, Professor Harold Berman has noted, must be looked at "not as a body of rules, but as a process, an enterprise, in which rules have meaning only in the context of institutions and procedures, values, and ways of thought."¹⁴ To understand why law is under stress and how the new media are contributing to this situation, it is important to do more than study particular laws or institutions. It is necessary to attend to fundamental aspects of legal process. As Alvin Toffler has recognized, "if we are to deal with a legal crisis, it seems to me we are going to have to probe more deeply. What is happening is deeper than most of our judges and lawyers, our presidents and our presidential candidates suspect. For what is happening is not merely the breakdown of law, but, more importantly, the breakdown of the underlying order upon which law is based."¹⁵

What is this underlying order or foundation upon which the process of law rests? Iredell Jenkens has written that,

law is very like an iceberg; only one-tenth of its substance appears above the social surface in the explicit form of documents, institutions and professions, while the nine-tenths of its substance that supports its visible fragment leads a sub-aquatic existence, living in the habits, attitudes, emotion and aspirations of men.¹⁶

It is important, therefore, to determine how the values of the legal order and the habits of thought underlying the legal order, are influenced by processes of communication. Change which occurs in this facet of the legal process may occur slowly, but it will also be long lasting and will affect the subsequent development of both legal rules

demonstrates only the limitations of vision that accompany technological innovation.

Brakel, *supra* note 12, at 957.

14. H. BERMAN, *LAW AND REVOLUTION* 11 (1983).

15. Toffler, *The Future of Law and Order*, ENCOUNTER, July, 1973, at 15.

16. I. JENKINS, *SOCIAL ORDER AND THE LIMITS OF LAW* 9 (1980). Frederick Jackson Turner similarly recognized that "behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions." F. TURNER, *THE FRONTIER IN AMERICAN HISTORY* 2 (1920), in Miller, *Technology, Social Change and the Constitution*, 33 GEO. WASH. L. REV. 17 (1964).

and institutions.

Our legal system both fosters and reflects liberal legal values such as equality, privacy and other individual rights. Limiting state power and protecting individuals from abuses of state power are ideals which the legal system strives to achieve. What would be the effect on law if there were to be a substantial shift in public belief in such values? Is there a connection between the form of communication in a society and the values of that society? Such values change slowly and the process of change is often invisible, but such a shift is also more long lasting than any change in legal doctrine. It is, therefore, a better indication of a transformation of law than a change in doctrine would be.

Our system of law also requires individuals to have certain habits of thought, patterns of thinking and personality traits. This is a rarely noted aspect of law and would not be important unless the new media opened up the possibility of change here as well. What are these habits of thought that underlie the legal order? One example might be the ability to appreciate abstract concepts and engage in abstract thought. Law is an abstraction and our legal system requires individuals to be able to apply abstract rules to concrete situations. It requires comprehension of nontangible concepts such as "rights," "reasonable men" or "states of emergency." Similarly, our process of law places a premium on thinking linearly and on accepting procedural justice as a substitute for real justice. We assume that it is proper and desirable to treat everyone the same way, even though in actuality we are all different and in different circumstances.

Are the habits of thought that are fundamental to our legal culture undergoing change? Are we becoming more accepting of non-linear thought, for example, and is this related in some way to our new media? McLuhan and others have asserted that such change will take place and it is, therefore, an issue worth pursuing.¹⁷ When new forms of technology are used in an institution or in a society they become agents for change. They can affect how individuals think and relate to other individuals and institutions.¹⁸ While new legal doctrines are being generated to control obvious effects of the new media, the more subtle and long term effects may be ignored. The values and habits of thought of individuals do change over time and can lead to major changes in

17. M. McLuhan, *supra* note 4, at 303; T. Schwartz, *THE RESPONSIVE CHORD* (1973).

18. E. Havelock, *PREFACE TO PLATO* ix (1963); Goody and Watt, *The Consequences of Literacy*, in *LITERACY IN TRADITIONAL SOCIETIES* 55 (J. Goody ed. 1968).

societal institutions. As will be seen below, such changes probably occurred in the centuries following the introduction of print and contributed to the evolution of the modern legal order. To understand why such changes occurred, the focus should not be on the doctrines of law but on the qualities of the new medium of communication, on the adoption of the new medium by legal institutions and on the use by citizens and groups of citizens of the new media.

II. The Nature of Media

Marshall McLuhan's assertion that "the medium is the message" brought him considerable publicity but did not increase public understanding of the important qualitative differences among media and the influence these differences may have on society.¹⁹ Just as law is falsely perceived by the public to be a set of rules, communications media are mistakenly looked at in terms of their content and not in terms of the influential qualities of the particular medium. How people communicate is usually thought to be much less significant than what is communicated. Most research on television, therefore, has been concerned with identifying the nature of the information which is communicated and the effect of this information on attitudes and behavior.²⁰ This focus on the substance of programs rather than on the process of communication is a natural outgrowth of the common belief that means of

19. See Wolfe, *What If He Is Right*, in *THE PUMP HOUSE GANG* 105 (1968); J. MILLER, MARSHALL McLUHAN (1971); McLUHAN, *HOT AND COOL* (G. Stearns ed. 1967); Casey, *Harold Adams Innis and Marshall McLuhan*, 27 *ANTIOCH REV.* 5 (1967).

20. The depiction on prime time television of most facets of American society has been studied to see whether the portrayal is accurate. See, e.g., Gerbner, Gross, Morgan and Signorielli, *Health and Medicine on Television*, 305 *THE NEW ENGLAND JOURNAL OF MEDICINE* 901 (Oct. 1981); Gerbner, Gross, Morgan and Signorelli, *The Mainstreaming of America: Violence Profile No. 11*, 30 *JOURNAL OF COMMUNICATIONS* 10 (Summer 1980); Arons and Katsh, *How TV Cops Flout the Law*, *SATURDAY REVIEW*, March 19, 1977, at 11; Morgan and Gross, *Television and Educational Achievement and Aspirations*, in *TELEVISION AND BEHAVIOR: TEN YEARS OF SCIENTIFIC PROGRESS AND IMPLICATIONS FOR THE 80's* (D. Pearl, J. Lazar, L. Bouthilet eds. 1982).

The content of television news programs has been subjected to similar content analyses. See, e.g., *TELEVISION NETWORK NEWS: ISSUES IN CONTENT RESEARCH* (W. Adams and F. Schreibman eds. 1978); W. ADAMS, *TELEVISION COVERAGE OF INTERNATIONAL AFFAIRS* (1982); W. ADAMS, *TELEVISION COVERAGE OF THE NINETEEN EIGHTY PRESIDENTIAL CAMPAIGN* (1983); Katsh, *The Supreme Court Beat: How Television News Covers the United States Supreme Court*, 67 *JUDICATURE* 6 (1983).

communication serve a function analogous to that of a moving company. Their job is to transport messages from sender to receiver. While they may affect the speed at which something is moved, they will have no effect on the item itself. Whether a car is shipped by truck, train, airplane or boat, for example will not change the car. Similarly, it is thought, whether one sends a message by letter, by telephone or by television does not affect the content of the message. Under this view, there is no need to study anything but the content of television programs. The medium seems to be irrelevant.

McLuhan tried to popularize a contrary point of view. In asserting that "the medium is the message," McLuhan argued that if one wants to understand the impact of a communication medium on a society, one should focus on the means of communication and not on the content of what is communicated by the medium.²¹ For example, McLuhan claimed, one could have learned much more about post-Gutenberg society from looking at the form of the printed page and the impact of printing on the spread of information, than from knowing that the first book printed was the Bible. To use the moving company analogy again, if everything in the United States is shipped by truck, McLuhan might argue that one could learn more about the society by studying the nature of trucks than by knowing that some trucks carry cars and others carry television sets. It is quite probable that content has an impact but it is also true that study of the medium's influential qualities has been neglected. Until recently, for example, historians gave little attention to the changes brought about by the shift from manuscripts to printing.²² Similarly, legal literature reveals very little understanding of the powerful influence that the invention of printing exerted upon law and a high level of unawareness of how the new media are likely to lead to change.²³

21. M. McLuhan, *THE GUTENBERG GALAXY* (1962); M. McLuhan, *supra* note 4, at 164.

22. E. Eisenstein, *supra* note 1, at 3.

23. Law librarians seem much more sensitive than legal historians to the influence of printing on law. See Graham, *Our Tong Maternall Marvelously Amendyd and Augmentyd: The First Englishing and Printing of the Medieval Statutes at Large, 1530-1533*, 13 U.C.L.A. L. REV. 58 (1965); Graham and Heckel, *The Book That 'Made' the Common Law: The First Printing of Fitzherbert's La Graunde Abridgement, 1514-1556*, 51 L. LIB. J. 100 (1958); Hendeson, *Legal Literature and the Impact of Printing on the English Legal Profession*, 68 LAW LIB. J. 288 (1975).

The most important recent analysis of law and the new media that does pay attention to the novel qualities of the new media is in a book by Pool. I. DE SOLA POOL,

The two most ardent proponents of the long term influence of communications media on society have been the late Marshall McLuhan and his colleague and mentor Harold Innis.²⁴ The first theme of Innis' writings is that the use of a new medium of communication alters the distribution of information in a society and, as a consequence, its social structure. The development of writing, for example, led to societies being more hierarchical, since writing was a skill that only persons in power were apt to possess.²⁵ Anthropologist Claude Levi-Strauss has noted that writing's first uses were "connected first and foremost with power. It was used for inventories, catalogues, censuses, laws and instruction. In all instances, whether the aim was to keep a check on material possessions or on human beings, it is evidence of the power exercised by some men over other men."²⁶ Information in such societies, therefore, tended to flow down from the top rather than from citizens and groups to other citizens and groups. The invention of printing and the subsequent spread of literacy caused information to be disseminated to broader sectors of the population. The change which resulted from information flowing across classes as well as from the upper class downward, led to challenges to the traditional social order. It encouraged the development of liberal political theories and to increased demands for the protection of rights and for limits on state power.

The second main theme in Innis' writings is the influence of media on the concepts of time and space. Innis categorizes both media and societies as being either time-oriented or space-oriented.²⁷ Speech, for example, is a time-oriented medium since it can be used to carry on a

TECHNOLOGIES OF FREEDOM (1983). Pool's perception of the important qualities of the new media and of the qualitative difference between print and the new media is somewhat similar to my own. His focus however is on first amendment values of freedom of expression and how the new media have greater potential for increasing free expression. This article is broader in purpose and is intended to explore the relationship of the new media to basic facets of the process of law. *See also* Gibbons, *The Relationship Between Law and Science*, 22 IDEA 227 (1982); J. BING AND T. HARVOLD, *LEGAL DECISIONS AND INFORMATION SYSTEMS* (1977).

24. H. INNIS, *EMPIRE AND COMMUNICATIONS* (1950) & *THE BIAS OF COMMUNICATION* (1951).

25. "The sword and pen worked together. Power was increased by concentration in a few hands, specialization of function was enforced. . . . The written record signed, sealed, and swiftly transmitted was essential to military power and the extension of government." H. INNIS, *EMPIRE AND COMMUNICATION* 10 (1950).

26. *THE FUTURE OF LITERACY* 18 (R. Disch ed. 1973) (interview with Georges Charbonnier).

27. H. INNIS, *THE BIAS OF COMMUNICATION* 61-131 (1951).

tradition, but is a poor medium for traversing large distances. He argues, therefore, that oral societies were highly concerned with the local community and its history, traditions, religion, and culture. Space-oriented media, such as print, by contrast are light and easily transportable, and, therefore, they encourage expansion over larger areas, leading to the growth of secular states and a concern for the present and the future. For Innis, a society's media determines its fundamental values and forms of organization. Western society, which under this theory had originally been a time-oriented oral society, began to become space-oriented with the invention of writing, and became more space-oriented with the development of printing. The media with the greatest bias in terms of space are the electronic media. As will be discussed below, distance is not a limitation for such media.

McLuhan, unlike Innis, sees media more as devices which alter perceptual habits than as conveyors of information. He speculates that different media require the use of different senses and that, depending on which senses are used, individual and, ultimately, societal habits of thought are affected.²⁸ The transformation of an oral culture into a literate one involves more, for McLuhan, than an increase in the amount of available information. When one talks to someone face to face, all of a person's senses may be used. Reading, however, uses only the eye. The effect of this, according to McLuhan, is profound. One who obtains information from a printed page rather than from another human being acquires new personality traits.²⁹ He learns to think abstractly, to "act without reacting," and to confront social issues and problems in a detached, uninvolved and impersonal way.³⁰ Typography, McLuhan asserts, separates the senses and, therefore, thought from feeling.³¹ These traits contribute to society which values rationality, uniformity, individuality, and systematic and abstract thought.³²

This effect of typography on personality and societal characteristics is heightened by the particular format of the printed page. The pages of the first printed books looked very much like those of manuscripts.³³ The typeface used was similar to a written script since that was what individuals were accustomed to reading. After a period of

28. McLuhan, *supra* note 4, at 59.

29. *Id.* at 33.

30. *Id.* at 157-8.

31. *Id.* at 59.

32. *Id.* at 262.

33. *See infra* note 63.

years, however, printed pages began to look different from manuscripts. The printed page, like this one, acquired a uniform and orderly look to it. The societal effect of this change is that

[O]nce a culture uses such a medium for a few centuries, it begins to perceive the world in a one-thing-at-a-time, abstract, linear, fragmented, sequential way. And it shapes its organizations and schools according to the same premises. The form of print has become the form of thought.³⁴

There is one more explanation of the influence of media which is relevant to a discussion of the new media's cultural influence. This view holds that different media have different abilities to transmit some kinds of information and, therefore, affect the kind of information available in society. Abstract ideas and concepts, for example, are much more easily communicated in print than in televised form, whereas for portraying violent conflict or farcical humor, the opposite is true. Different media have different strengths. Each medium acts as a filter, letting some kinds of information through easily, some with difficulty, and some not at all. Depending on which media are dominant in society, certain kinds of information will be communicated more often and become important in society while others will become less so.

III. The Influence of Printing On Law

The following description of the impact of printing on law is a model for placing current technological developments in perspective. It provides insight into which changes will occur first and which later, and how deeply the institution of law may be affected. Most importantly, it provides a basis for understanding why the qualities of new communications media will have an impact on the process of law.

A. The Development of the Legal Doctrines of Censorship and Copyright

The two most obvious legal doctrines related to the development of printing were censorship and copyright.³⁵ The vast increase in the num-

34. Culkin, *A Schoolman's Guide to Marshall McLuhan*, in *MCLUHAN: PRO AND CON* 249 (R. Rosenthal ed. 1968).

35. *Id.* at 499. Copyright, if it is viewed as a bar on unrestricted publication, is related to censorship. Indeed the early grants of exclusive printing rights were intended

ber of books which were printed and circulated in the last half of the fifteenth century was quickly perceived to be a threat to those in power. Professor Ithiel de Sola Pool has noted:

Before printing, there had been no elaborate system of censorship and control over scribes. There did not have to be. The scribes were scattered, working on single manuscripts in monasteries. Moreover, single manuscripts rarely caused a general scandal or major controversy. There was little motive for central control, and control would have been impractical. But after printing, Pope Alexander VI issued a bull in 1501 against the unlicensed printing of books.³⁶

In 1529, Henry VIII issued a proclamation banning certain books which were odious to him or to the clergy who advised him.³⁷

Copyright came into being after the invention of printing because the nature of authorship changed. A thirteenth century Franciscan, Saint Bonaventure, described four ways of making books:

A man might write the works of others, adding and changing nothing, in which case he is simply called a 'scribe' (scriptor). Another writes the work of others with additions which are not his own; and he is called a 'compiler' (compiler). Another writes both other's work and his own for purposes of explanation; and he is called a 'commentator' (commentator). . . . Another writes both his own work and others' but with his own work in principal place adding others' for purposes of confirmation; and such a man should be called an 'author' (auctor).³⁸

Completely original works are not even part of this scheme. Elizabeth

to protect the state and church from unwanted publications. In England in the sixteenth and seventeenth centuries,

the legitimate book trade, like other trades in the middle ages, was put under the regulation of a city company, the stationers, while enforcement lay with the Privy Council, the Star Chamber, and (for theological matters) the High Commission, which took the view that all printing, however innocent, was crime unless the work had been previously licensed. Conversely, the government would sometimes give monopoly rights of printing works which it considered meritorious or useful, and in this way the beginnings of copyright appear.

Id. See also, L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 6-7 (1968).

36. I. DE SOLA POOL, TECHNOLOGIES OF FREEDOM 14 (1983).

37. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 498 (1956).

38. E. EISENSTEIN, *supra* note 1, at 121-22.

Eisenstein has noted that “until it became possible to distinguish between composing a poem and reciting one, or writing a book and copying one. . . how could modern games of books and authors be played?”³⁹ Printing grew rapidly because it was possible to make money doing so. Authorship became important and protection of the author’s work was made possible through copyright.⁴⁰

The legal rules which developed as a response to the new medium of printing are interesting but they do not provide great insights into the subsequent development of law. In some countries, censorship laws were avoided or ignored by the printers. Numerous attempts in many countries to ban and censor texts, from the fifteenth to the eighteenth century, were often not successful because enforcement mechanisms were ineffective. In France, for example, book dealers and publishers did not encounter “too many risks because they knew how to take precautions and to secure themselves the necessary protection. There was no police force, legal procedures were very complicated and the King himself was not always inclined to act harshly.”⁴¹ When harassment was successful, printed works were smuggled in from outside the country. Febvre and Martin’s study of the French book trade, for example, showed that

[f]orbidden tracts and pamphlets were smuggled into France with ease, even into the goals where the Huguenots were imprisoned. Everywhere underground organizations formed to trade in illegal books. Often the officials of the Booksellers’ corporations whose job it was to inspect imported crates of books were accomplices in the trade. In practice they took action against smugglers only when they had no choice in the matter. How, in any case, particularly given the administrative limitations of the governments of the period, could one hope to put a stop to the smuggling of books, which were small objects and easily concealed? Consequently the prime outcome of the policy of rigorous official censorship was the establishment, around the French borders in the 18th century, of a series of printing businesses producing pirated editions and editions of banned books in complete freedom. The works of the *philosophes* were printed by these firms. Sometimes indeed the Chancellor had

39. *Id.*

40. As noted earlier, control over publication prior to enactment of the Statute of Anne in 1709 was given to the printing company and the publisher, therefore, held the copyright. The Statute of Anne for the first time allowed for copyright to be in the name of the author. L. PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 5 (1968).

41. L. FEBVRE & H. MARTIN, THE COMING OF THE BOOK 300 (1976).

the disagreeable surprise of discovering his coachman bringing pernicious books to Paris concealed in his own carriage. Soon, under Malesherbe's influence, the officials in charge of censorship sought to relax the regulations, granted tacit permission for the publication of certain books and were tolerant in other ways. It is evident that official censorship as it was then understood had proved to be ineffectual.⁴²

What the history of censorship laws suggests is that during the early period when censorship laws were common, the power of the state, as embodied in these laws, was struggling with the power of the medium. Focusing merely on the laws provides little basis for predicting future changes, such as the development of first amendment values, whereas a focus on the qualities of the medium, on the behavior of the printers, and perhaps on the law enforcement process, might suggest the course of future developments. The sixteenth and seventeenth century nation state was dealing with a medium that was to prove to be more powerful than it was.

B. Printing and Changes in Legal Institutions

Less noticeable but more important were changes that occurred in legal institutions. The almost immediate affinity between law and print and the willingness of the law to employ the technology of print, is striking. William Caxton printed the first book in England in 1476.⁴³ Five years later the first law books were printed and in 1485 the printing of parliamentary session laws began.⁴⁴ The first printing of law books began a process that was to make the printed law book a central feature in the modern paradigm of law. The printing of law books

42. *Id.* at 246-7.
43. Graham, *supra* note 23, at 58.
44. *Id.* In France, religious works comprised the largest category of books printed before 1500. This was not surprising since most readers were clerics. In the first decades of the sixteenth century, however, the percentage of religious works declined, and the proportion of classical and legal texts increased. An analysis of who owned a library during this period suggests the effect of printing not only on law but on the secularization of society:

	Lawyers	Churchmen
1480 - 1500	1	24
1501 - 1550	54	60
1551 - 1600	71	21

L. FEBVRE & H. MARTIN, *supra* note 41, at 263.

gradually turned the law library into as central a legal institution as the courthouse.⁴⁵ The printed book gradually became the repository of law and, in this country at least, the library became the heart of the modern law school. Christopher Columbus Langdell, the founder of modern legal education, was very sensitive to this point when he noted that "law is a science, and that all the available materials of that science are contained in printed books. . .law can only be learned and taught in a university by means of printed books. . .printed books are the ultimate sources of all legal knowledge."⁴⁶

Printing technology, through the creation of case reporters, has dominated legal education in this country for the past one hundred years. It has prompted the analysis of and reliance upon precedent in ways not previously possible. One could simply not have had a system of precedent in a society that relied solely on writing. In a study of one of the earliest printed digests, Howard Jay Graham and John Heckel stated:

The earliest digesters, with their printers, are the prophets and unsung heroes of the Common Law. It is strange more has not been made of their role and achievements. We can see very clearly today that it was in part because Nicholas Statham, Sir Anthony Fitzherbert, and later, Sir Robert Brooke, abstracted the "cases of the yeres," roughly ordered them by subjects, reduced practitioners' colloquies to procedural guides and principles, that English lawyers got to searching their books for *rules*, thinking more and more in terms of judicial *precedent* rather than in the old terms of judicial consistency, writs, cases and forms of actions. Fortuitously, printing made these first crude digests widely available at the very time English law was undergoing its heaviest challenge from the Continent. It doubtless would be an exaggeration to say that the Common Law was "saved" by printing. But certainly the Common Law as device, symbol, and system was in considerable part a product of its own compilation, ordering and improved distribution. During the crucial early Tudor period, in particular, printing and simpler indexing gave reader access, coherence and form; they accelerated future growth no less than did practice and

45. Christopher Columbus Langdell wrote that "We have also constantly indicated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists." Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123, 124 (1887).

46. *Id.*

utility.⁴⁷

C. The Influence of Printing on Values, Habits of Thought and Social Change

In her recent work, *Printing As an Agent of Social Change*, Elizabeth Eisenstein asserts that printing made possible the Protestant Reformation of the sixteenth century,⁴⁸ the Scientific Revolution of the seventeenth century⁴⁹ and preserved the contributions of the earlier Renaissance in a way that scribes would not have been able to do.⁵⁰ Her analysis, along with the theories of Innis and McLuhan, explain many of the underlying changes in values which printing caused and which led to important changes in law.

1. *Flow of Information: Challenges to Authority*

Printing caused a radical change in the number of books produced and in the distribution of books. Clapham has asserted that "[a] man born in 1453, the year of the fall of Constantinople, could look back from his fiftieth year on a lifetime in which about eight million books had been printed, more perhaps than all the scribes of Europe had produced since Constantine founded his city in A.D. 330."⁵¹ Other estimates assert that twelve to twenty million books were printed before 1500 and that one hundred and fifty to two hundred million copies were printed in the sixteenth century.⁵² This was a revolutionary change compared to what had existed previously. Equally important, it made possible the spread of information in previously unforeseen

47. Graham and Heckel, *supra* note 23, at 101. There are substantial differences between modern and medieval attitudes toward precedent, some of which can be related to differences between writing and print. For a discussion of how the authority of prior cases has changed over the centuries, see T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (1956); A. HOGUE, *ORIGINS OF THE COMMON LAW* (1966); C. ALLEN, *LAW IN THE MAKING* (1964); V. CAENEGAM, *THE BIRTH OF THE ENGLISH COMMON LAW* (1973).

48. E. EISENSTEIN, *supra* note 1, at 303-13.

49. *Id.* at 453-516.

50. *Id.* at 163-302.

51. CLAPHAM, *Printing*, in *A HISTORY OF TECHNOLOGY FROM THE RENAISSANCE TO THE INDUSTRIAL REVOLUTION* 377 (C. Singer, E. Holmyard, A. Hall, and T. Williams eds. 1957).

52. L. FEBVRE & H. MARTIN, *supra* note 41, at 262.

ways.⁵³

Legal information, too, began to circulate in new ways. In England, in the mid-1500s, "[t]he crucial acts of the reformation parliament were not only printed, published and proclaimed, but posted in every parish. . . ."⁵⁴

Literate Englishmen now had what learned judges and serjeants even had lacked in Fortescue's and Littleton's time: ready access and reference to the texts of statutes on which their cases and problems turned. To encounter and reread Professor Plucknett's shocking account of what the scarcity of manuscript copies of the statute law had meant in the fourteenth and fifteenth centuries is to grasp something of the Tudors' excitement, relief, and sense of wonder, at the Great Books: 300 years of the reigns, councils, Parliaments, statutes, in full sweep. In English, tabled by chapters. Magna Carta and the Charter of the Forest "thirty times confirmed," as Coke later would observe in an extraordinary understatement. (Actually the number was 44 and the reconfirmations become strikingly evident, even in Redman's Tabula.) The *Great Boke* and *The Boke of Magna Carta* thus were powerful factors in creating the Tudor image and tradition of constitutionalism. . . ."⁵⁵

Martin Luther's challenge to the authority of the Catholic Church, which was fostered by print, was later followed by a secular challenge to authority, also encouraged by print. The increase in the spread of

53. When Luther proposed debate over his Ninety-Five Theses his action was not in and of itself revolutionary. It was entirely conventional for professors of theology to hold disputations over an issue such as indulgences and 'church doors were the customary place of medieval publicity.' But these particular theses did not stay tacked to the church door (if indeed they were ever really placed there). To a sixteenth century Lutheran chronicler, 'it almost appeared as if the angels themselves had been their messengers and brought them before the eyes of all the people.' Luther himself expressed puzzlement, when addressing Pope Leo X six months after the initial event: It is a mystery to me how my theses, more so than my other writings, indeed, those of other professors, were spread to so many places. They were meant exclusively for our academic circle here. . . . They were written in such a language that the common people could hardly understand them. They. . . use academic categories. . . .

E. EISENSTEIN, *supra* note 1, at 306-7.

54. Graham, *supra* note 23, at 77.

55. *Id.* at 93.

information provided access to information and promoted consciousness of rights and other ideals of the liberal legal order.⁵⁶

2. *Time and Space: Preserving and Distributing Information*

The Lutheran example indicates that print was more successful than writing in overcoming problems of distributing information over wide areas. "Printing made it possible for the first time to publish hundreds of copies that were alike and yet might be scattered everywhere."⁵⁷ Print also had considerable advantages in preserving texts over time. This was very different from scribal culture "where every copy was unique, with its own variations."⁵⁸ In such a culture, it was impossible to be certain what the original author had written. The more a book was copied, the less authentic it became.⁵⁹

How did printing preserve the past? Thomas Jefferson once wrote:

Very early in the course of my researches into the laws of Virginia I observed that many of them were already lost, and many more on the point of being lost, as existing only in single copies in the hands of careful or curious individuals, on whose deaths they would probably be used for waste paper. . . . How many of the precious works of antiquity were lost while they existed only in manuscript? Has there ever been one lost since the art of printing has rendered it practicable to multiply and disperse copies? This leads us then to the only means of preserving those remains of our laws now under consideration, that is, a multiplication of printed copies.⁶⁰

Thus, printing preserved the past and created continuity by making valuable data public, rather than secret. This "ran counter to tradition, led to clashes with new censors, and was central both to early modern science and to Enlightenment thought."⁶¹ The more permanent quality of print fostered notions of stability, consistency and predictability. These values, in turn, can be related to belief in the concept of rights. As Eisenstein notes,

56. See *infra* notes 70-81 and accompanying text. ..

57. SARTON, *The Quest for Truth: Scientific Progress During the Renaissance*, in *THE RENAISSANCE: SIX ESSAYS* 66 (1962).

58. I. DE SOLA POOL, *supra* note 23, at 213.

59. PRINTING AND THE MIND OF MAN, xix (J. Carter, P. Muir eds. 1967).

60. E. EISENSTEIN, *supra* note 1, at 116.

61. *Id.*

[i]n France, also, the 'mechanism by which the will of the sovereign' was incorporated into the 'published' body of law by 'registration' was probably altered by typographical fixity. It was no longer possible to take for granted that one was following 'immemorial custom' when granting an immunity or signing a decree. Much as M. Jourdain learned that he was speaking prose, monarchs learned from political theorists that they were 'making' laws. But members of parliaments and assemblies also learned from jurists and printers about ancient rights wrongfully usurped. Struggles over the right to establish precedents became more intense, as each precedent became more permanent and hence more difficult to break.⁶²

Most importantly, by creating identical standardized copies that could be available everywhere, printing fostered notions of equality. Individuals in different places could be aware of treatment that others were receiving in fairly distant places. Particularly as court decisions began to be printed and distributed, pressures arose for national uniformity and equal treatment regardless of place. This kind of uniformity could not be expected when manuscript copies were few and the copies that did exist were often slightly different from one another. In summary, the ability of printing to both expand the spatial distribution of information and preserve the past, gave print many advantages over writing. These qualities created new patterns of information flow, fostered liberal legal values and led to the development of the legal institutions with which we are familiar.

3. *Changes in Perceptual Habits*

Printing not only affected the flow of information but changed the image one perceived while reading.⁶³ The first printed books looked very much like manuscripts. The typeface used was similar to a written

62. *Id.* at 119.

63. The earliest incunabula looked exactly like manuscripts. The first printers, far from being innovators, took extreme care to produce exact imitations. The 42-line Bible for example was printed in a letter-type which faithfully reproduced the handwriting of the Rhenish missals. . . . How could they have imagined a printed book other than in the form of the manuscripts on which they were in fact modeled? And would not the identity of the book and manuscript be the most obvious proof of their technical triumph, as well as the guarantee of their commercial success?

L. FEBVRE & H. MARTIN, *supra* note 4, at 77-8 (1976). See also, E. GOLDSCHMIDT, *THE PRINTED BOOK OF THE RENAISSANCE* 37 (1966).

script. After a period of years, however, printed pages began to look very different from a page of manuscript. Communications theorist John Culkin illustrated the impact of this new uniform image on the perceptual habits of readers:

While lecturing to a large audience in a modern hotel in Chicago, a distinguished professor is bitten in the leg by a cobra. The whole experience takes three seconds. He is affected through the touch of the reptile, the gasp of the crowd, the swimming sights before his eyes. His memory, imagination, and emotions come into emergency action. A lot of things happen in three seconds. Two weeks later he is fully recovered and wants to write up the experience in a letter to a colleague. To communicate this experience through print means that it must first be broken down into parts and then mediated, eyedropper fashion, one thing at a time, in an abstract linear, fragmented, sequential way. That is the essential structure of print. And once a culture uses such a medium for a few centuries, it begins to perceive the world in a one-thing-at-a-time, abstract, linear, fragmented, sequential way. And it shapes its organizations and schools according to the same premises. The form of print has become the form of thought.⁶⁴

It is, unfortunately, impossible to prove whether or not the new uniform image of the printed page has a major influence on thought and behavior. McLuhan, the most famous advocate of this theory, was an insightful, provocative and witty writer, but was not always historically accurate in the examples he provided in support of his thesis. There is, nevertheless, something striking about the theory for anyone interested in the history of law. Some of the main qualities of printed words, such as their uniformity and repeatability, and the values that Culkin and McLuhan closely tie to a print based society, such as rationality, objectivity, and consistency, are also central ideals of the liberal legal tradition.

The appeal of this argument is made even stronger by looking at other changes involved in the shift from the written to the printed word. Changes occurred not only in the appearance of the page, but in the organization of books. Printers were much more involved in indexing, cataloguing and cross-referencing works than were scribes:

64. Culkin, *A Schoolman's Guide to Marshall McLuhan*, in *McLUHAN: PRO AND CON* 249 (R. Rosenthal ed. 1968).

The systematic arrangement of titles; the tables which followed strict alphabetical order; the indexes and cross-references to accurately numbered paragraphs all show how new tools available to printers helped to bring more order and method into a significant body of public law. Until the end of the fifteenth century, it was not always easy to decide just 'what a statute really was' and confusion had long been compounded concerning diverse 'great' charters. In 'Englishing and printing' the 'Great Boke of Statutes 1530-1533' John Rastell took care to provide an introductory 'Tabula': a forty-six page 'chronological register by chapters of the statutes 1327 to 1523.' He was not merely providing a table of contents; he was also offering a systematic review of parliamentary history—the first many readers had ever seen.⁶⁵

4. *The Communication of Abstract Ideals*

Print is an ideal medium for fostering both the habits of thought and the values of a liberal legal order. As noted earlier, different media have different strengths and abilities to communicate information of various kinds. Print is the most suitable medium for communicating law's abstract ideals and for encouraging abstract thought. The abstract concepts of law, while they originated in verbal thought, have been preserved and communicated in print. For citizens to accept law as a legitimate power requires, as political scientist Adelaide Villmoare has noted, "an underlying faith that the arbitrariness of humankind can be constrained to some degree by the rule of law."⁶⁶ Thus, what most people mean when they say that they believe in law or in the rule of law is that they believe that abstract and intangible rules can determine the outcome of individual disputes. They assume that when conflict occurs, already-existing rules can be consulted and used to resolve the dispute. Conversely, this means that if disputes are settled on a totally ad hoc basis with no reference to rules, the process of conflict resolution would be different from law. Theoretically, the legal model requires that "if a decision is to be rational it must be based upon some rule, principle, or standard. If this rule, principle, or standard is to make any appeal to the parties it must be something that pre-existed the decision."⁶⁷ Alternative systems might rely on custom, compromise,

65. E. EISENSTEIN, *supra* note 1, at 105.

66. Villmoare, *The Judiciary in the Context of the State*, 4 ALSA FORUM 9 (June 1979).

67. Fuller, *The Forms and Limits of Adjudication*, in THE LEGAL PROCESS 421

discussion, force, or any technique other than reliance upon pre-existing rules. They might or might not create more desirable outcomes than law. What is certain, in theory at least, is that they would be distinguishable from law as we know it today.

Respect for this idea of law is so traditional in our society that it is often forgotten what habits of thought and beliefs are required before a legal order can develop. One of these is belief in the power of abstract rules. For a society to have a legal system, one scholar has written, there must be a "belief in the power of certain words, put certain ways, to bring about certain effects denominated as legal. This kind of magic is necessary if law is to work."⁶⁸ This "kind of magic" can only occur if the words have been put in tangible form, either in writing, or, more effectively, in print. As Robert Pirsig has noted,

in this culture, a court of law can ask a witness to tell 'the truth, the whole truth, and nothing but the truth, so help me God,' and expect the truth to be told. But one can transport this court to India, as the British did, with no real success on the matter of perjury because the Indian mythos is different and the sacredness of words is not felt in the same way."⁶⁹

The differences between writing and print suggest a major transformation in law during the centuries following the introduction of printing. In addition to the examples just provided of changes in the fifteenth, sixteenth and seventeenth centuries, a brief look at the analysis in Roberto Unger's *Law in Modern Society*⁷⁰ provides additional confirmation of the link between printing and law. Although Unger makes no mention of the invention of printing or its impact on legal thought or institutions, his central thesis can provide an excellent context for ascertaining some of the links between law, printing, and other communications media.

Unger contrasts three forms of law. The first, "customary," is informal.⁷¹ Individuals in a group interact with one another guided by common expectations about what kind of conduct is proper and desirable. There is no separate body whose only function is to make rules.

(H. Hart and A. Sacks eds. 1958).

68. Berman, *The Background of the Western Legal Tradition in the Folklaw of the Peoples of Europe*, 45 U. CHI. L. REV. 563 (1978).

69. R. PIRSIG, *ZEN AND THE ART OF MOTORCYCLE MAINTENANCE* 344 (1974).

70. R. UNGER, *LAW IN MODERN SOCIETY* (1976).

71. *Id.* at 50.

The group as a whole develops understandings about proper standards of behavior. There is no written code. The second form of law, "bureaucratic," has "explicit rules established and enforced by an identifiable government."⁷² Law, in the bureaucratic society, is "deliberately imposed by government rather than spontaneously produced by society."⁷³ Unlike customary law, a bureaucratic society has a centralized authority which has most of the power in the society.

Unger's third concept of law is labeled the "legal order."⁷⁴ Like the bureaucratic form, it is characterized by the existence of an identifiable centralized government that establishes and enforces explicit rules. In addition, however, law in the legal order is both general and autonomous. It is general in the sense that legal equality is presumed to exist among citizens. The law is "expected to address broadly defined categories of individuals and acts and to be applied without personal or class favoritism."⁷⁵ The law is autonomous in that there is a body of rules which is more than a "mere restatement of any identifiable set of non-legal beliefs of norms, be they economic, political, or religious."⁷⁶ The law is secular, with special institutions to resolve disputes and interpret law, and a separate legal profession.

The "legal order," according to Unger, developed for the first time in history in Western Europe during the last few centuries. Its emergence became possible, he argues, because for the first time two social conditions existed:

1. Society was pluralistic, with no group having any assumed right to rule.⁷⁷ Competition existed among social and economic groups and there was a dwindling sense of community among the society's members. As a result, there was continuing level of societal instability.
2. A belief existed in a "higher universal or divine law as a standard by which to justify and to criticize the positive law of the state."⁷⁸ Systems more just than the existing order were believed to be possible.

72. *Id.*

73. *Id.* at 51.

74. *Id.* at 52.

75. *Id.* at 53.

76. *Id.*

77. *Id.* at 66-76.

78. *Id.* at 66.

These two forces created the basis for a legal system which balanced competing interests and limited the power of the majority.⁷⁹ In this new system, citizens could make claims on the state through formal specialized institutions. The law, which was made by humans, could now be challenged and changed by them.

For a variety of reasons, it is not surprising that the emergence of the "legal order" paralleled the development and spread of printing. First, printing helped create some of the political and social conditions Professor Unger thought necessary for the development of a liberal legal order. For example, the spread of printing quickened the development of national languages and spurred the formation of nation

79. Professor Harold Berman's recent study of the origins of the Western legal tradition, *LAW AND REVOLUTION* (1983), has a different emphasis from Unger and from the analysis presented here. Berman asserts that, "in the West, modern times—not only modern legal institutions and modern legal values but also the modern state, the modern church, modern philosophy, the modern university, modern literature, and much else that is modern—have their origin in the period 1050-1150. . ." *Id.* at 4.

In the late eleventh, the twelfth, and the early thirteenth centuries a fundamental change took place in Western Europe in the very nature of law both as a political institution and as an intellectual concept. Law became disembedded. Politically, there emerged for the first time strong central authorities, both ecclesiastical and secular, whose control reached down, through delegated officials, from the center to the localities. Partly in connection with that, there emerged a class of professional jurists, including professional judges and practicing lawyers. Intellectually, western Europe experienced at the same time the creation of its first law schools, the writing of its first legal treatises, the conscious ordering of the huge mass of inherited legal materials, and the development of the concept of law as an autonomous, integrated, developing body of legal principles and procedures.

Id. at 86. The cause of this revolution was Pope Gregory VII who, in the 1070s, proclaimed the legal supremacy of the Pope over all Christians and over all secular authorities.

Berman's focus is on the centuries before printing and, while he recognizes that transformation in law was caused by later events, such as the Reformation, he traces the seeds of change to the earlier period. In terms of the analysis and perspective presented here, the most unfortunate omission in *Law and Revolution* is the lack of recognition given to the limitations of writing. The revival of law in the eleventh century centers around a discovery of a manuscript of Justinian's code and the development of law in the centuries following is derived from analysis and study of this text. Berman may be correct that the seeds of Western law were planted in the late eleventh century and he provides a great deal of interesting information on scribal culture. Ultimately, however, further change would have been impossible, as the limitations of writing as a form of communicating information were reached. *Id.*

states.⁸⁰ Printing also assisted the democratization of knowledge and political institutions. As Daniel Boorstin has noted, because of printing, "the knowledge of the few became the knowledge of the many, with the effect, as Carlyle observed, of 'disbanding' hired armies, and cashiering most kinds and senates and creating a whole new democratic world."⁸¹ The level of political instability which made a liberal legal order seem desirable occurred in part as a result of the spread of information which printing made possible. Unger's analysis is important because it emphasizes that law today is very different from what it once was. The bureaucratic form of law became the legal order as a result of several changes in societal values and institutions. If similarly fundamental changes are occurring today, it is important to understand why they are taking place, see how they are related to the new communications technologies, and assess whether a new form of law is likely to develop.

IV. The Influence of New Media on Law

The foregoing analysis suggests that both law and society underwent a broad transformation following the invention of printing. Changes in rules, institutions and values led to a transformation that might be labeled revolutionary.⁸² Are comparable large scale changes

80. S. STEINBERG, *FIVE HUNDRED YEARS OF PRINTING* 117 (1955).

81. Address by Dr. Daniel Boorstin, Dedication of the National Humanities Center at North Carolina Research Triangle Park (April 16, 1977).

82. Clearly, the "revolution" was not violent and, therefore, falls outside the definition of "revolution" that is often used. Berman, for example, states that:

The history of the West has been marked by recurrent periods of violent upheaval, in which the preexisting system of political, legal, economic, religious, cultural, and other social relations, institutions, beliefs, values, and goals has been overthrown and replaced by a new one. There is by no means a perfect symmetry in these periods of great historical change; yet there are certain patterns or regularities. Each has marked a fundamental change, a rapid change, a violent change, a lasting change, in the social system as a whole. Each has sought legitimacy in a fundamental law, a remote past, an apocalyptic future. Each took more than one generation to establish roots. Each eventually produced a new system of law, which embodied some of the major purposes of the revolution, and which changed the Western legal tradition, but which ultimately remained within that tradition.

H. BERMAN, *supra* note 79, at 19. The transformation discussed in this essay is a "silent revolution." Kenneth Boulding has written that such revolutions are not to be confused with those storms on the surface of history generally called 'revolutions' which raise a great deal of dust and cause a lot of

likely to occur in our society due to the introduction of the electronic media? The following discussion is intended more to identify critical areas and issues which must be addressed than to predict specific changes. Our era, like that following the invention of printing, may be one of "seeming continuity with radical change,"⁸³ where important developments may be unnoticed. Some of the outcomes suggested below are admittedly speculative, and some will be influenced by policy choices that our society will make. To make the wisest decisions in these areas, it is important to be aware of the underlying reasons for change.

A. Changes in Legal Doctrine

Changes in traditional legal doctrines are the least important indicator of future change. They are usually responses to the first uses of the new medium. They often occur with little understanding of the qualities of the new media or of likely future uses that will be different from the initial use.⁸⁴ Copyright law is the clearest example of an area of law that is fighting for its continued existence and is destined to lose. Copyright is a technique of regulation that is ideally suited to a me-

trouble but which generally end up with the same old things called by a new set of names. The ecological revolutions in society are the silent revolutions, often taking centuries to accomplish their course. They are the revolutions in ideas, in ideals, in techniques, which carry a society from one way of life to another.

K. BOULDING, *THE ORGANIZATIONAL REVOLUTION* xxvii (1968). *See also* T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 136 (1970), E. HAVELOCK, *supra* note 18, at ix.

83. E. EISENSTEIN, *supra* note 1, at 51.

84. Ithiel de Sola Pool has summarized the legal system's understanding of the new media as follows:

In each of the three parts of the American communications system—print, common carriers, and broadcasting—the law has rested on a perception of technology that is sometimes accurate, often inaccurate, and which changes slowly as technology changes fast. Each new advance in the technology of communications disturbs a status quo. It meets resistance from those whose dominance it threatens, but if useful, it begins to be adopted. Initially, because it is new and a full scientific mastery of the options is not yet at hand, the invention comes into use in a rather clumsy form. Technical laymen, such as judges, perceive the new technology in that early, clumsy form, which then becomes their image of its nature, possibilities, and use. This perception is an incubus on later understanding.

I. DE SOLA POOL, *supra* note 23, at 7.

dium such as printing where the location of making the copies can be identified.⁸⁵ Copying machines and videotape recorders have presented the most publicized threats to copyright law⁸⁶ but the computer, which will essentially provide each household with a copying machine, will provide the final blow to the copyright system of regulation. Yet, the demise of copyright,⁸⁷ or, for example, the recent rise in privacy legislation⁸⁸ in response to the new media, do not really help us in our search for what the role of law will be in the future. To understand whether law will be more or less important in the future as a tool for resolving conflict, the focus needs to be elsewhere.

B. The Effect of New Media on Legal Institutions

The effect of the new media on legal institutions will be visible less quickly than the impact on legal doctrine. In addition, the most quickly visible changes may not be the most important ones. For example, the struggle over whether television cameras should be allowed into the courtroom has received much attention but may be less important than other uses of video technology, such as the use of videotaped testimony.

85. Established notions about copyright become obsolete, rooted as they are in the technology of print. The recognition of a copyright and the practice of paying royalties emerged with the printing press. With the arrival of electronic reproduction, these practices became unworkable. Electronic publishing is analogous not so much to the print shop of the eighteenth century as to word-of-mouth communication, to which copyright was never applied.

Consider the crucial distinction in copyright law between reading and writing. To read a copyright text is no violation, only to copy it in writing. The technological basis for this distinction is reversed with a computer text. To read a text stored in electronic memory, one displays it on the screen; one writes it to read it. To transmit it to others, however, one does not write it; one only gives others a password to one's own computer memory. One must write to read, but not to write.

I. DE SOLA POOL, *supra* note 23, at 214.

86. *Universal City Studios v. Sony Corp. of America*, 480 F. Supp. 429 (D.C. Cal. 1980), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, *Sony Corp. of America v. Universal City Studios*, ___ U.S. ___, 104 S. Ct. 774 (1984); *Encyclopedia Britannica Ed. Corp. v. Crooks*, 447 F. Supp. 243 (W.D.N.Y. 1983).

87. I hope it is clear that changes in copyright law do not mean the end of reward for creative effort. Copyright will be replaced gradually by another form of regulation that is more in tune with the nature of the new media.

88. See, e.g., Privacy Act of 1974, 5 U.S.C. § 522; Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(t).

Will the trial as a face-to-face coming together of the parties become even more rare than it is today? Print never completely replaced the trial or oral argument. Will these forums, which rely on our original medium of speech, be modified by video without an exhaustive analysis of what such a change implies?⁸⁹

More basic, perhaps, is the effect of computerization of library resources⁹⁰ on precedent and the notion of the common law. Computerization of case reporters has occurred at a point in time when the growth of reporters threatens to become unmanageable.⁹¹ A system of precedent will not function effectively when there are too few cases being decided and it also will not work when there are too many cases. In the past, the nature of printing technology imposed some limitation on how many cases could be printed and how quickly they would be published. The digest system made the whole process manageable. Where there are too many prior cases in an area and where cases are added to the data base much more quickly than in the past, unpredictability and instability will be the result. This will pose a challenge to the idea of precedent and to the foundation of the common law. Whereas print

89. See *supra* note 13.

90. Taylor, *Legal Information Centers: The Electronic Law Libraries of the Future*, in CONFERENCE ON LEGAL EDUCATION IN THE 1980's 82 (1981).

91. *Law Libraries and Miniaturization*, 66 LAW LIB. J. 395 (1973). It is interesting that the West digest system was developed at the end of the nineteenth century at a time when "there was a feeling that the multiplication of law reports would one day destroy the law as it was known." Young, *A Look at American Law Reporting in the 19th Century*, 68 LAW LIB. J. 294, 304 (1975). The number of volumes of American case reports had increased from 18 in 1810 to 473 in 1836 to 3,800 in 1885. One commentator in 1882 wrote that

[t]he ratio of increase in the published volumes is constantly accelerating. . . . That the number of courts whose opinions are being reported and the numbers of judges writing opinions are constantly increasing, is beyond doubt. . . . There are now two hundred and ninety-eight state and territorial judges, and eighty-two Federal judges,—in all, three hundred and eighty,—whose opinions are being regularly published. . . . And yet, . . . the system of law reporting may be said to be in its infancy. . . . Unless some means shall speedily be devised of checking this appalling number of publications, it is perhaps within the bounds of moderation to assert that lawyers now in practice at the bar may live to see the number of volumes. . . . [in English] exceed twenty-thousand.

High, *What Shall Be Done With The Reports*, 16 AM. L. REV. 429, 434-35 (1882). The digests not only provided a solution to this problem but probably also subtly shaped the attitudes of generations of lawyers and law students about the degree of order and orderliness that existed in the legal system.

fostered the development of the idea of precedent, the use of computers may signal the erosion of this model of law.

The basic question is whether the computerization of cases and other material will ultimately reduce the authority of prior decisions and modify the idea of precedent. Common law attitudes toward precedent are not accepted in most of the world's legal systems and took several hundred years to develop in England. It is important to note that modern systems of precedent require two things: that we think in terms of being consistent with prior cases and that what is written by the judge in the printed decision by itself has authority to determine a later decision. The evolution of the common law involved the development of a system where prior cases become important and also a system, such as exists today, where the printed decision is important in itself. The authority of the printed decision, however, came much later than the idea of taking prior cases into account and involved a shift of thought in terms of what the prior case would stand for. In the early days, prior cases provided evidence of custom and it was custom that was considered most important. As Plucknett writes, "[i]n the Year Book period cases are used only as evidence of the existence of a custom of the court. It is the custom which governs the decision, not the case or cases cited as proof of the custom."⁹² As we place more and more cases in the computer data base, and do this much faster than printing technology allowed, will what is retrieved have the same status and authority and be perceived in the same way as printed judicial decisions, which are retrieved from those fairly dignified looking books called reporters?

In answering this question, several other qualities of computers, in addition to the difference in appearance between the book and computer, need to be considered. First, opinions are being added to the data base in greater and greater quantity. In future litigation, there will be more and more decisions on both sides of an issue, providing even more opportunity than there currently is for every party to a case to construct a legal argument supported by a host of cases. Second, cases are being added more quickly. Pressure will be exerted to use new cases, to continuously modify and to add to arguments in pending cases. At some point in this process the "myth of certainty"⁹³ will become more obviously a myth and the system's allegiance to precedent, a fragile house of cards, may disintegrate. Can the computer provide

92. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 347 (1956).

93. J. FRANK, *LAW AND THE MODERN MIND* 3-13 (1963).

an antidote or solution to prevent this from occurring? Can programs be developed to evaluate and reduce the amount of data that is retrieved from the data base? On one level, programs can assist the user to narrow the search for cases to something that is manageable for the user. But, since computers are capable of more impressive feats, programs will be designed to do more, to apply some rule to cases the program identifies as relevant.⁹⁴ In other words, if the model of storing decisions in a central data base continues, attempts will be made to employ the data manipulation function of the computer. At that point, when the process moves away from the current print model, some change in the law's attitude toward precedent will begin to change as well.

Third, computerization of law materials will probably broaden the range of materials users will come in contact with. Print made cases the center of the law collection and the digest system made the cases useable. Print has not dealt as efficiently with statutory or regulatory material.⁹⁵ They are more difficult both to locate and retrieve. These areas are increasingly important areas of law and the computer data bases can be expected to include them and make them as accessible as judicial decisions. This broadening of the reach of the legal researcher involves much more than a change in research techniques. It has the potential for creating competition for the case as the building block of the legal system.

Although the image of cases as the heart of the library may remain for some time, the fact is that the computerized law library is already quite different from the print library, and the differences will grow more noticeable as time passes. Although LEXIS and WESTLAW began by storing cases, they have greatly broadened the information accessible from their terminals. In addition to cases, for example, the LEXIS library includes access to DIALOG, a collection of 150 databases covering science, medicine, social science, current affairs and humanities, the National Automated Accounting Research System, and NEXIS, a full-text library of general and business publications. It is as if a variety of non-law libraries have been moved into the law library. As these sources of information are discovered, they

94. Tyree, *Fact Content Analysis of Case Law: Methods and Limitations*, 22 JURIMETRICS J. 1 (1981); Tyree, *Can a 'Deterministic' Judge Overrule Himself?* 7 RUTGERS J. OF COMPUTERS, TECH. AND L. 381 (1980); D'Amato, *Can/Should Computers Replace Judges?* 11 GA. L. REV. 1277 (1977).

95. L. FRIEDMAN, A HISTORY OF AMERICAN LAW (1973).

will begin to be used more than they are today and, along with the regulatory and statutory material that will become accessible, will change the image and authority of the judicial decision.

Ithiel de Sola Pool notes a fourth aspect of computerizing information that is worth considering.

One change that computers seem likely to cause is a decline of canonical texts produced in uniform copies. In some ways this change will signal a return in print to the style of the manuscript, or even to the ways of oral conversation. . . . A small subculture of computer scientists who write and edit on data networks like the Arpanet foreshadow what is to come. One person types out comments at a terminal and gives colleagues on the network access to the comments. As each person copies, modifies, edits and expands the text, it changes from day to day. With each change, the text is stored somewhere in a different version.⁹⁶

The kind of future Pool envisions may portend a new attitude toward the authority or finality of decisions and toward the process of making decisions. The appearance of decisions in printed form, particularly Supreme Court decisions, emphasizes the idea that decisions are end points. Actually the decision is only an end point for the parties involved in the case. For the rest of us, every decision is a stopping point in a travel that includes the present case and future cases. It is a journey that never really ends. We perceive decisions as end points because it is convenient to do so and gives them authority they might not otherwise have. We should not assume that how we perceive decisions is inevitable. Rather, it is a culturally-based phenomenon that is partly related to print. If the method of recording cases, storing them and retrieving them changes, then the way they are perceived may change as well.

C. The New Media and Its Influence On Values, Habits of Thought and Social Change

1. *Flow of Information*

Assuming the existence of fairly unrestrictive governmental policies toward the new media, new patterns of communication between citizens and groups of citizens will begin to occur. The telephone and

96. I. DE SOLA POOL, *supra* note 23, at 213-14.

the postal service allow communication between two individuals. Computers allow for the sharing of information among much larger numbers of individuals in ways that are not now possible. New networks of communication will be created with information obtained by citizens being communicated to other citizens. Unlike broadcasting, which is a mostly hierarchical form of communication, microcomputers allow communication horizontally to other individuals or groups with similar interests. Until now, "[t]here has been no means for a *group* of people to adequately exchange information among themselves and reach decisions, other than to meet frequently face to face and talk it out."⁹⁷ This kind of change in the flow of information promises to lead to increased demands on the state to satisfy aggrieved parties and newly-formed interest groups. New "classes" can now be identified, whether they are owners of 1982 Chevrolets or purchasers of Cabbage Patch dolls. As grievances are identified and publicized, pressures for satisfying grievances will increase. There will be increased pressure to resolve such problems quickly.⁹⁸ The speedup of information thus poses a threat to the procedurally-oriented, methodical quality that is at the heart of law.

The analysis presented here leads to several conclusions that are different from most popular perceptions about the computer. Orwell's 1984 portrayed the technological era as one in which the state could control information and restrict the flow of information among citizens. The earliest uses of computers, which could be afforded only by governments, corporations, or other large groups and institutions, reasonably led to this conclusion. Fairly soon, however, this model will probably be outmoded. The computer is unlike a telephone, which was always a device for communicating between two individuals. Computers allow each individual to make his or her ideas available to others, to "publish" ideas in ways that were not previously possible. The model of the

97. S. HILTZ AND M. TUROFF, *THE NETWORK NATION: HUMAN COMMUNICATION VIA COMPUTER* xxv (1978).

98. A taste of the future is provided by the Federal Trade Commission's (FTC) agreement with General Motors to turn one of its largest consumer injury cases over to volunteer arbitrators of the Council of Better Business Bureaus. The case involved 200,000 owners of General Motors' cars and trucks, suspected of having defective parts, who had spent \$100,000,000 on repairs. The FTC, which was criticized by consumer groups for abandoning a practice to seek a single solution to a common consumer problem, stated that "the alternative to the agreement would have been at least another ten years of litigation with uncertain results." *New York Times*, November 18, 1983, at A36.

future is one in which information will be moving around the country, if not the globe, faster than ever before among individuals and groups who could not previously communicate with each other. States, corporations, and other societal institutions will indeed be able to collect information about individuals and organize it in ways that were not previously possible. Yet, individuals too will be able to collect, manipulate and communicate information in new ways. Orwell's fear was reasonable for the first stages of the computer revolution, perhaps, but not necessarily for later stages.

What impact will this have on traditional values? This analysis leads to the conclusion that it is not necessarily freedom that is in danger but values and concepts that we relate to freedom. The spatial bias of the electronic media, the emphasis on the present, and the quickening of the process of change pose a threat to the model of law which is slow,⁹⁹ methodical and relies on precedent. Print fostered the model of procedural justice, and of equal rights, but not of substantive equality. The pressures of the new media will be to demand actual equality. Law was often used to defuse conflict. Grievances were channeled into an institution that applied rules and appeared to be neutral. This model may be less satisfactory or workable in the future as "rights," "rules," and "neutrality" become less acceptable concepts.

Another effect of the speed with which information can now travel concerns privacy and its alter ego, secrecy. Privacy, as a concept, does seem endangered.¹⁰⁰ But privacy is also a fairly recent concept. It was not a concept that was familiar in oral cultures where everybody knew everyone else. Attempts to protect privacy, like attempts to maintain copyright, seem ultimately doomed to failure. The most that law might be able to achieve is to prevent the use of inaccurate information about individuals, but this is not the same as protecting an individual's privacy. The lack of privacy has a governmental counterpart in the lack of secrecy. Government officials have complained that it is almost impossible to keep a secret. It is, therefore, both individual and governmental

99. For an interesting consideration of law as theater and the problem of speeding up trials, see Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STANFORD L. REV. 81 (1975).

100. Miller, *Privacy in the Modern Corporate State*, 25 AD. L. REV. 231 (1973); Miller, *Privacy in the Corporate State: A Constitutional Value of Dwindling Significance*, 22 J. OF PUB. L. 3 (1973); Linowes, *Must Personal Privacy Die in the Computer Age?* 65 A.B.A. J. 1181 (1979); Washburn, *Electronic Journalism, Computers and Privacy*, 3 COMPUTER L. J. 189 (1981); Gordon, *The Interface of Living Systems and Computers: The Legal Issues of Privacy*, 2 COMPUTER L. J. 877 (1980).

information that is accessible and not easily controlled. This analysis suggests that it is not necessarily true that governmental power will increase as a result of the new media. What does seem likely is that demands for justice and social change will increase and, as a result, the level of social conflict will increase as well.¹⁰¹ The legal mode of dealing with such a state of affairs seems dated and outmoded, not very well suited to social conditions of change and instability that are not even contained within the boundaries of the nation-state. As a result, new modes of conflict resolution can be expected to be developed to take their place alongside law.

2. *Time and Space*

The new media would, in Harold Innis' terms, have a very strong space bias.¹⁰² Their strength is in communicating information over vast distances. Conversely, they are also relatively impermanent. These qualities too, will ultimately have important legal and social consequences. For example, the electronic media are able to tell us what is happening in some distant place and it does this very quickly. Our frames of reference have become expanded beyond national boundaries. As information flows across national boundaries in such quantity, some

101. Goody and Watt's assessment of the differences between oral and literate cultures suggests a related reason for an increase in social conflict:

The literate mode of communication is such that it does not impose itself as forcefully or as uniformly as is the case with the oral transmission of the cultural tradition. In non-literate society every social situation cannot but bring the individual into contact with the group's patterns of thought, feeling and action: the choice is between the cultural tradition—or solitude. In a literate society, however, and quite apart from the difficulties arising from the scale and complexity of the 'high' literate tradition, the mere fact that reading and writing are normally solitary activities means that in so far as the dominant cultural tradition is a literary one, it is very easy to avoid; as Bertha Phillpotts wrote in her study of Icelandic literature:

Printing so obviously makes knowledge accessible to all that we are inclined to forget that it also makes knowledge very easy to avoid. . . . A shepherd in an Icelandic homestead, on the other hand, could not avoid spending his evenings in listening to the kind of literature which interested the farmer. The result was a degree of really national culture such as no nation of today has been able to achieve.

Goody & Watt, *The Consequences of Literacy*, in LITERACY IN TRADITIONAL SOCIETIES 59-60 (J. Goody ed. 1968).

102. See *supra* notes 24-34 and accompanying text.

kinds of new institutions will be necessary to mediate demands and problems. While printing assisted in the creation of the modern nation state,¹⁰³ the electronic media will likely lead to new institutions that are international in nature. One already clear example of an institution whose foundation is the ability of the computer to conquer distance is the multinational corporation.¹⁰⁴ Administering a corporate enterprise that has parts in distant places is now possible. While attempts are still made to treat such entities as if they were creatures of a single state or nation,¹⁰⁵ some new conception and treatment of the multinational corporation will ultimately evolve. As contact between individuals and groups in different countries increases, due to the capability of the computer to conquer distance, new relationships will evolve and experiments in structuring these relationships will develop. For example, the class of people injured by some product will quickly be identified as consisting of individuals living in different countries. The new "classes" of interest groups may also be international in nature, such as protestors for a nuclear freeze, and create new national and international pressures for approaches to resolving problems. Some of these approaches may be legal in nature. While traditional international law and legal tribunals have not been overwhelming successes, it may be that the necessary communications infrastructure for an effective international legal institution simply has not yet ever existed.

The impressive ability of the electronic media to conquer distance diverts attention from its main weakness, a quality of impermanence and tendency to focus on the present. Law is, of course, a process that insists on maintaining links with the past, with fostering continuity, consistency and predictability. Print played a pivotal role in developing a system with such values. The spatial bias of the new media will emphasize uniformity over space and should foster demands for equality over large areas. Print encouraged this, too, but could never do it as effectively as the electronic media are able to do. The effect of this change in focus will be to create additional pressures to change the traditions and goals of law.

103. S. STEINBERG, FIVE HUNDRED YEARS OF PRINTING 117 (1955).

104. R. BARNET & R. MULLER, GLOBAL REACH 26 (1974).

105. *Container Corp. of America v. Franchise Tax Bd.*, — U.S. —, 103 S. Ct. 2933 (1983).

C. The Visual Image

Video and computer technology share the qualities already mentioned but differ in one major way. Video relies on pictures and the spoken word while computers still rely on reading. While both may use a television set to communicate information, the path from the set to one's brain is different. In his valuable book, *The Responsive Chord*, media consultant Tony Schwartz described the television image and the brain processes necessary to watch television:

In watching television, our eyes function like our ears. They never see a picture, just as our ears never hear a word. The eye receives a few dots of light during each successive millisecond, and sends these impulses to the brain. The brain records this impulse, recalls previous impulses, and expects future ones. In this way we "see" an image on television.

Film began the process of fracturing visual images into bits of information for the eye to receive and the brain to reassemble, but television completed the transition. For this reason, it is more accurate to say that television is an auditory-based medium. Watching TV, the brain utilizes the eye in the same way it has always used the ear. With television, the patterning of auditory and visual stimuli is identical.¹⁰⁶

Television can effectively communicate enormous amounts of information. The issue being raised here, however, concerns whether certain values are more difficult to transmit via television and whether certain forms of thought are conditioned merely by the frequent act of watching television. Print has acted as a catalyst and contributor toward the development of conceptual knowledge and allowed the seemingly unarbitrary categorization of knowledge, people, and actions by the legal system. The "myth of certainty,"¹⁰⁷ and the belief that law can be consistent, stable and predictable, are, as described earlier, to some extent functions of the fact that these ideas are generally learned from books. Acceptance of this model of law, it would seem, may be more difficult for a person whose

mode of thinking is now in sync with his mode of perceiving. . . . When print dominated our communication environment, men sought conceptual knowledge about the world. To achieve this,

106. T. SCHWARTZ, *THE RESPONSIVE CHORD* 14-16 (1973).

107. J. FRANK, *LAW AND THE MODERN MIND* 3-13 (1963).

sensory information had to be translated into a linear, cognitive mode. In our electronic communication environment no translation is necessary. A young person perceives sensory information a millisecond at a time, and he experiences life as a continuous stream of fleeting, millisecond events. In this way of life, involvement has greater value for young people than conceptual knowledge about the world.¹⁰⁸

Recent psychological research on perception and behavior lends additional support to the movement away from print and toward a decibel culture.”¹⁰⁹ Professor Robert Ornstein has written that “one of the most basic differences between individuals is between those who tend to employ the linear, verbal mode and those who are less verbal and more involved in spatial imagery.”¹¹⁰ Law emphasizes linear, verbal abilities.

108. T. SCHWARTZ, *supra* note 105, at 111.

109. G. STEINER, IN *BLUEBEARD'S CASTLE* 116 (1971).

110. R. ORNSTEIN, *THE PSYCHOLOGY OF CONSCIOUSNESS* 39-40 (1972). Ornstein further explains that there is a neurological basis for these different modes of consciousness:

The difference between the left and right sides of the body may provide a key to open our understanding of the psychological and physiological mechanisms of the two major modes of consciousness.

The cerebral cortex of the brain is divided into two hemispheres, joined by a large bundle of interconnecting fibers called the “corpus callosum.” The left side of the body is mainly controlled by the right side of the cortex, and the right side of the body by the left side of the cortex. When we speak of left in ordinary speech, we are referring to the side of the body, and to the right hemisphere of the brain.

Both the structure and the function of these two “half-brains” in some part underlie the two modes of consciousness which simultaneously coexist within each one of us. Although each hemisphere shares the potential for many functions, and both sides participate in most activities, in the normal person the two hemispheres tend to specialize. The left hemisphere (connected to the right side of the body) is predominantly involved with analytic, logical thinking, especially in verbal and mathematical functions. Its mode of operation is primarily linear. This hemisphere seems to process information sequentially. This mode of operation of necessity must underlie logical thought, since logic depends on sequence and order. Language and mathematics, both left-hemisphere activities, also depend predominantly on linear time.

If the left hemisphere is specialized for analysis, the right hemisphere (again, remember, connected to the left side of the body) seems specialized for holistic mentation. Its language ability is quite limited. This hemisphere is primarily responsible for our orientation in space, artistic endeavor, crafts, body image, recognition of faces. It processes information

The need to develop these abilities explains the absence of photographs in legal casebooks and may also explain some of the resistance to clinical legal education. Television, on the other hand, provides one possible explanation for Dean Walter Probert's statement that "something about these times makes legalistic conditioning more difficult in law schools."¹¹¹

V. Conclusion

Television is new and law is old. But it is a serious mistake to think of law as an ancient phenomenon that exists now as it has always existed. Law has ancient roots, but much of its contemporary form and values would be unrecognizable and unintelligible to persons who lived two or three thousand years ago. Most of the processes and values of law have changed as new societies and cultures have evolved.

The model of law which has prevailed in the West for the last few centuries—the liberal ideal of a system of abstract rules—is under great stress. It is expected to perform many functions, but its inherent power is not nearly as great as the public believes. Contrary to its portrayal on television, law is not all-powerful. Unlike the stone edifices which have been built to house its institutions, law is quite fragile. When it works, it is often only because it has been barely powerful enough to achieve its purpose. Evidence of its frequent failure and weakness—from criminal violence to continuing racial and sex discrimination—is provided daily. Given these conditions, it is vitally important to understand the influence of any new, important cultural development. I have suggested several points of contact between law and the new communications media which are such a development and which have, until now, been ignored. I hope that the framework presented here will lead to further studies of this subject and will expand the way in which the relationship between law and communications is perceived.

The theme running through this article has been that as new forms of communication develop, the model of law which prevails in a society

more diffusely than does the left hemisphere, and its responsibilities demand a ready integration of many inputs at once. If the left hemisphere can be termed predominantly analytic and sequential in its operation, then the right hemisphere is more holistic and relational, and more simultaneous in its mode of operation.

Id. at 51-3.

111. W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* 18 (1972).

will change. The process of law probably began when the primary group lost control, a period which coincides with the introduction of writing. As psychologist Julian Jaynes has noted, "by 2100 B.C. in Ur, the judgments of the gods through their stewards began to be recorded. This is the beginning of the idea of law."¹¹² Liberal legal ideas became prominent and believable with the invention and spread of printing, even though law often worked in ways opposite to these ideals. The paradigm of law which now exists is not an endpoint but rather a stage in the continuing evolution of forms of social control and dispute resolution. The new media are one of the forces which must be considered in any discussion of the future of law. The thesis of this article is that in various ways, the message of the new media is anti-law. This may be one reason why "the law is becoming more fragmented, more subjective, geared more to expediency and less to morality; concerned more with immediate consequences and less with consistency or continuity."¹¹³ Yet, the effect of the new media is not necessarily authoritarian. It is just as possible that the new institutions which develop to resolve conflict will be more egalitarian, more participatory and, in the end,, more just.

It should also be emphasized that the new media will not make printing or books disappear. The new ways of communicating will not cause the printed word to be obsolete, just as the invention of printing did not make writing disappear and the development of writing did not stop people from speaking to each other. The creation of new media for communicating will, however, affect the frequency with which printing is used. Some information which is now communicated through print will be transmitted much more quickly through different media in the future. It is impossible to predict what the nature or the mix of media will be, but it will inevitably be quite different from what it is now. We may, as a result, be "working our way, painfully, through a development of some new workable image for lego-political processes, where law-as-rules will appear just a little silly."¹¹⁴

112. J. JAYNES, *THE ORIGINS OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND* 198 (1976).

113. H. BERMAN, *supra* note 79 at 39.

114. W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* 58 (1972).

A Challenge to Workers' Rights

Anthony Chase*

This symposium issue of the *Nova Law Journal* on workers' rights and the new technologies has, I think, several important points of reference. First among these is the recent special issue of *democracy* dealing with technology's politics¹—an issue which included the International Association of Machinists "Workers' Technology Bill of Rights."² A

* B.A., University of Wisconsin; J.D., Wayne State University; LL.M., Harvard Law School; Associate Professor, Nova University Center for the Study of Law.

1. DEMOCRACY: A JOURNAL OF POLITICAL RENEWAL AND RADICAL CHANGE (Spring, 1983) [hereinafter cited as DEMOCRACY]. The most important essay in the issue is Noble, *Present Tense Technology* DEMOCRACY 8-24 (Spring, 1983). See also the author's essential introduction to the relation between American history and modern technology—which he regards as a form of "social production": D. NOBLE, *AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM* (1977).

2. For proposals which parallel in important respects the IAM legislation, see Conyers, Jr., *Social Reform and Law Reform: Toward an Economic Bill of Rights*, 1983 DET. C. L. REV. 1121, 1125-26:

The nature of work and production is changing dramatically as a result of computers, robotics, and the general downsizing of products of all sorts which require less and less labor input. As one example, thirty years ago several thousand telephone operators handled a million long-distance calls. Ten years later, several hundred operators accomplished the same task, and today only a dozen are needed. Technological displacement of labor in itself is nothing new. After all, from 1920 to 1980 the ranks of United States farm workers dropped from eleven to under three million. Yet, during this period, industrial expansion absorbed much of the displaced farm labor. The novel feature today is the pervasive force of new technologies which threatens to displace workers across manufacturing and service industries alike, unless counteractive labor-saving policies such as a reduced workweek are enacted. Job growth also will be curtailed by the rising tide of imports. The decision of Atari to close down its computer operation in California and to shift 1,700 jobs to Taiwan reveals the extent to which even high-tech mass production can be handled less expensively and with a comparably skilled workforce overseas. . . .

What is needed today is a restructuring of the relationship between the private economy and government, a closer integration between public and private decision-making, and a new social contract and economic bill of rights which protects workers, upgrades human resources, promotes full employment, safeguards the economic base of communities, and ensures

second point of reference is the series of recent law review symposium

that federal action is responsive to the basic needs of citizens.

Along with economists, policy specialists, and community leaders, I am developing new legislation which is tentatively titled, "The Recovery and Full Employment Planning Act," and which I hope to introduce in Congress next year. Professor Bertram Gross, Emeritus Professor of Public Policy at Hunter College, who has authored every piece of full-employment legislation since the original concept in 1944, including drafts of the Humphrey-Hawkins Full Employment and Balanced Growth Act of 1978, is coordinating the project.

Ford, *Plant Closing Legislation*, 1983 DET. C.L. REV. 1219, 1219:

The economy of the United States is undergoing profound changes as it responds to rapid technological innovation and growing international competition. As one result of these changes, every state and region of the country is suffering from the effects of massive, sudden plant closings which wipe out hundreds or thousands of jobs in a single blow, leaving communities and workers unprepared for widespread unemployment and unable to make orderly adjustments. Neither the common law of the states, the National Labor Relations Act, nor any other federal statute, allows the affected workers or government any meaningful voice in business investment or disinvestment decisions that can mean financial ruin for them. Consequently, disinvestment decisions are usually undertaken without any consideration for the communities they affect.

I have introduced legislation in the House of Representatives, entitled the National Employment Priorities Act, H.R. 2847, which will grant new rights to the workers and communities affected by plant closings and provide for a more equitable sharing of the benefits and costs of economic change.

In their introduction to the IAM "Workers' Technology Bill of Rights," the editors of DEMOCRACY cite testimony before a United States House Subcommittee by IAM President William W. Winpisinger concerning the effects of the new technology on skilled labor. In a discussion on the relative merits of various American labor leaders, historian David Montgomery provides this interesting note on the head of the IAM:

These endeavors have thrust William ("Wimpy") Winpisinger into the limelight as the most highly placed champion of what might be called the respectable Left within the AFL-CIO. Under his leadership the International Association of Machinists has vigorously supported the Democratic Socialist Organizing Committee (as if the union had rediscovered its political orientation of 1911), and Winpisinger has confronted George Meany with the first consistent and principled opposition from within the executive council since the formation of the AFL-CIO. Although Winpisinger shies away from both the Old Left and the New, and has dissociated himself from Sadlowski's workplace confrontation with the bosses, and although he campaigns only for issues which are already to be found in the official program of the AFL-CIO, his prominence is important for two rea-

issues concerning conflicts which overlap with workers' rights and the new technologies: *Industrial Relations Law Journal's* forum on critical labor law theory,³ *University of Pennsylvania Law Review's* symposium on the public/private distinction,⁴ *New York University Review of Law & Social Change's* colloquium issue on the labor movement at the crossroads,⁵ and *Texas Law Review's* special critique of rights issue.⁶

Finally, of course, the critical reference point is social reality itself: the emerging synthesis of law, labor, and technological transformation. This synthesis—and what it may portend for the future of American social relations—is dramatically illustrated by the recent closure of industrial manufacturing facilities which, according to their owners, are no longer competitive and cannot be rebuilt where they are while exploiting current technologies of production.⁷ Commenting on the now well-known 1980 federal case of *Local 1330, United Steel Workers v. United States Steel Corporation*,⁸ Jay Feinman remarks that

[t]his case, in the words of Chief Judge Edwards of the Sixth Circuit, 'represents a cry for help from steelworkers and townspeople

sons. First, he calls incessantly for popular mobilizations, which both activate the labor movement and unite it with other social forces. "We need to set aside our knee-jerk reaction to other groups," he explains. Second, he bases his campaign to "fire Meany" explicitly on the premise that labor must repudiate "the economic ground rules of big business," and on the frequent declaration that he is a socialist. But the Wimpy phenomenon exists only because of the rebellion at the base, and that insurgency has also produced its indigenous forms of struggle, which are very different from national conferences or Washington lobbying.

D. MONTGOMERY, *WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES* 172-173 (1979).

3. *Forum* 4 IND. REL. L.J. 449 (1981).

4. *Papers from the University of Pennsylvania Law Review Symposium on The Public/Private Distinction Held at the University of Pennsylvania on January 23, 1982* 130 U. PENN. L. REV. 1289 (1982).

5. *Colloquium: The Labor Movement at the Crossroads*, 11 N.Y. UNIV. REV. OF L. & SOC. CHANGE 1 (1982-83).

6. 62 TEX. L. REV. 000 (1984).

7. See P. DECARVALHO, *PLANT CLOSINGS AND RUNAWAY INDUSTRIES: STRATEGIES FOR LABOR* (1981); S. LYND, *THE FIGHT AGAINST SHUTDOWNS* (1982); Lynd, *What Happened in Youngstown: An Outline*, 15 RADICAL AMERICA 37-48 (No.4, 1981); *Management Prerogatives, Plant Closings, and the NLRA* 11 N.Y. UNIV. REV. OF L. & SOC. CHANGE 83-124 (1982-83).

8. See *Local 1330, United Steel Workers v. United States Steel Corp.*, 492 F. Supp. 1 (N.D. Ohio 1980); *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980).

in the City of Youngstown, Ohio who are distressed by the prospective impact upon their lives and their city by the closing of two large steel mills . . . operated (in Youngstown) by (U.S. Steel) since the turn of the century'. One of the arguments advanced was under contract law: the doctrine of promissory estoppel barred U.S. Steel from closing the plants because of representations made by company officials that the company would not close the plants if the employees' efforts rendered the plants profitable. This argument was rejected by the district court and the court of appeals because the elements of promise and reliance stated in section 90 of the *Restatement (Second) of Contracts* had not been met.⁹

The district court also rejected the steelworkers' contention that they had developed a property right in the nature of an easement¹⁰ which should prevent United States Steel from abandoning Youngstown. Nevertheless, the court did imply that the steelworkers had presented a strong case for their having a moral right, if not a legal remedy, to keep the company in Youngstown. "This Court," asserted District Judge Lambros,

has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the close of the Mahoning Valley plants, and yet the lives of 3500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years. Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation.¹¹

The cause of the crisis facing the steelworkers, according to the court, was "obsolescence and market forces" and the basic problem was the absence, "in the code of laws of our nation," of an existing legal remedy. Could the solution to this problem, and similar ones raised by the

9. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L.REV. 829, 858 (1983).

10. See Local 1330, *United Steel Workers v. United States Steel Corp.*, 492 F. Supp. 1, 9-11 (N.D. Ohio 1980).

11. Local 1330, *United Steel Workers v. United States Steel Corp.*, 492 F. Supp. 1, 10 (N.D. Ohio 1980), *quoted in* Local 1330, *United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1266 (6th Cir. 1980).

generation of new and innovative technologies of production, be the approach to workers' rights proposed in the IAM legislation?

The threshold issue is whether democratic social change in general, or the interests of workers in particular, can be advanced through the production and promotion of rights. Resistance to the traditional progressive notion (generated within nineteenth-century working class social movements)¹² that worker emancipation and workers' rights go hand-in-hand has developed as a tendency within the critical legal studies movement:¹³ a tendency to which I refer as "postmodernism."¹⁴ The

12. See J. KUCZYNSKI, *GESCHICHTE DER LAGE DER ARBEITER UNTER DEM KAPITALISMUS* (40 Vols., 1960-1972); E.J. HOBBSAWM, *LABOURING MEN* (1964); W. ABENDROTH, *A SHORT HISTORY OF THE EUROPEAN WORKING CLASS* (1972); S. AND B. WEBB, *INDUSTRIAL DEMOCRACY* (1897); P.S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* (6 Vols., 1947-1982); H. GUTMAN, *WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA: ESSAYS IN WORKING-CLASS AND SOCIAL HISTORY* (1976); L. FINK, *The Uses of Political Power: Toward a Theory of the Labor Movement in the Era of the Knights of Labor*, in *WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY* (M. Frisch & D. Walkowitz, eds. 1983); N. SALVATORE, *EUGENE V. DEBS: CITIZEN AND SOCIALIST* (1983).

13. See *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys, ed. 1982); Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship* 95 HARV. L. REV. 1669 (1982). See also Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L.REV. 1103, 1202 (1983) (characterizing radical utopianism through the work of critical legal scholars such as Roberto Unger, Duncan Kennedy, and Mark Tushnet):

The utopianism of the democratic radical suggests even less defensible conclusions about rights and the institutions ultimately needed to protect them. If democratic radicalism's theory of human nature were correct, institutional structures would not play a significant role in the protection of rights. People in the community would develop shared values and, in making democratic choices, would respect any worthy rights. The democratic radical identifies aspects of individuality that a community ought to protect and longs for the day when face to face communities will internalize those aspects with such tenacity that institutional safeguards will not be necessary to protect substantively valued rights. This perspective is not confined to judicial review or fundamental rights. The democratic radical yearns for the community where shared values will replace law.

Id. Although Shiffrin effectively identifies the same tendency within critical legal studies that I will be analyzing, he confuses that tendency with the totality of democratic radicalism. Apparently Shiffrin's reading of democratic radicals fills a very short shelf. Cf., Chase, *The Left On Rights: An Introduction*, 62 TEX. L.REV. 000 (1984); and, for the most important recent work on the relation between rights and democratic radicalism, see C. FRANQUI, *FAMILY PORTRAIT WITH FIDEL* (1984). See also Bobbio, *Are There Alternatives to Representative Democracy?* 35 TELOS 17 (Spring, 1978); Cas-

postmodernist analysis of rights is a response to what Joel Whitebook

toriadis, *Socialism and Autonomous Society*, 43 TELOS 91 (Spring, 1980); Cohen, *Beyond Reform or Revolution? The Problem of French Socialism*, 55 TELOS 5 (Spring, 1983).

14. See H. Foster, *Postmodernism: A Preface* in THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE ix (H. Foster, ed. 1983):

Postmodernism: does it exist at all and, if so, what does it mean? . . . Craig Owens and Kenneth Frampton frame its rise in the fall of modern myths of progress and mastery. But all the critics, save Jurgen Habermas, hold this belief in common: that the project of modernity is now deeply problematic. . . In short, modernism, as even Habermas writes, seems 'dominant but dead.'

Id. It is relatively easy (and appropriate) to assimilate to what Foster (and many other cultural critics) call "postmodernism" that radical utopian tendency within critical legal studies (identified above by Shiffrin) which sometimes designates itself as "Irrationalist"; see *Debates About Theory Within Critical Legal Studies*, LIZARD 3, 4 (Jan. 5, 1984) (on file at the Nova Law Journal):

The irrationalist wants to unfreeze the social structure of meaning, to free up the possibilities for new ways to think and act in the world. In this view, law is merely an instance of social mythologizing. And it's not that there is some way of 'reasoning' that is immune to the critique; there is no 'true' analysis that comports with the way things really are, because there is no hard social reality separate from our social construction of meaning.

Id. "Postmodernism" is a better label than "Irrationalism" since hostility to reason (and thus the Enlightenment), as well as a natural receptivity toward the work of Michel Foucault, constitute but one representative aspect of the ensemble of values and intuitions presented to society by the critical legal studies postmodernist tendency. Out-right opposition to structure and organization, "scientific Marxism," economism, instrumentalism, what Robert Gordon would call "large-scale theories of historical inter-relations between states, societies, and economies," and, special antipathy toward individualism and rights, rounds out the general image of postmodernist attitudes within critical legal theory; see R. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys, ed. 1982); Boyle, *Opposition, Splits, and Tensions*, 8th NATIONAL CONFERENCE ON CRITICAL LEGAL STUDIES: INFORMATION PACKET & READINGS 35-38 (March 16-18, 1984) (on file at the Nova Law Journal).

While critical of hierarchical social relations and the alienation which they produce, the postmodernists would probably agree with Fred Dallmayr that ". . . the malaise of modern and contemporary life can be traced, either directly or indirectly, to its anthropocentric and subjectivist thrust or its focus on the thinking subject; according to some the malaise has already reached a crisis stage with the result that the 'end' or 'death of man' is imminent (if not an accomplished fact). Spokesmen differ as to the nature of proposed antidotes or substitutes for modern subjectivity and individualism; but a preferred (though not uniformly endorsed) remedy consists in a radical shift of attention, aimed at dislocating or 'decentering' man in favor of overarching structures or systemic relationships." F. DALLMAYR, TWILIGHT OF SUBJECTIVITY: CONTRIBU-

calls the "crisis of modernity":

Three different responses to the crisis of modernity can be distinguished. The first two, anti-humanism and the counter-enlightenment, are alike in so far as both maintain that modernity is irredeemably *aporetic*; the crisis of modernity cannot be resolved from within, but requires a holistic transformation of the modern project. The positions differ with respect to the alternative directions they advocate. The third position, of which Habermas is the primary exponent, maintains that the crisis can only be resolved by completing, rather than abandoning, the modern project. As he asks, "should we try to hold on to the *intentions* of the Enlightenment, feeble as they may be, or should we declare the entire project of modernity a lost cause?" The modern project is not *aporetic*, but only at odds with itself. The crisis of modernity, as he sees it, results from the absolutization of instrumental reason and the concomitant suppression of practical reason. He therefore seeks to rehabilitate the Enlightenment's tradition of practical reason and assert it against its tradition of instrumental reason in order to correct that imbalance. It is thus with respect to practical reason that he wants to "hold on to the *intentions* of the Enlightenment."¹⁵

TIONS TO A POST-INDIVIDUALIST THEORY OF POLITICS 11 (1981). Dallmayr thus helps to explain the postmodernist appreciation of Foucault and Derrida as well as the parallel commitment to application of structural and deconstructionist techniques within the study of American law; see E. KURZWEIL, *THE AGE OF STRUCTURALISM: LEVI-STRAUSS TO FOUCAULT* (1980); M. FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS, 1972-1977* (C. Gordon, ed. 1980); J. DERRIDA, *WRITING AND DIFFERENCE* (A. Bass, trans. 1978); M. RYAN, *MARXISM AND DECONSTRUCTION: A CRITICAL ARTICULATION* (1982); C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* (1982); P. BURGER, *THEORY OF THE AVANT-GARDE* (M. Shaw, trans. 1984); C. NORRIS, *THE DECONSTRUCTIVE TURN: ESSAYS IN THE RHETORIC OF PHILOSOPHY* (1983).

The relation between modernism and postmodernism both inside and outside critical legal theory is fascinating and complicated. See *MODERNISM, 1890-1930* (M. Bradbury & J. McFarlane, eds. 1976); *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* (H. Foster, ed. 1983); M. BERMAN, *ALL THAT IS SOLID MELTS INTO AIR* (1982); J. LEARS, *NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920* (1981); Rajchman, *Foucault, or the Ends of Modernism*, 24 OCTOBER 37 (Spring, 1983); E. BRUSS, *BEAUTIFUL THEORIES: THE SPECTACLE OF DISCOURSE IN CONTEMPORARY CRITICISM* (1982); J. BURNHAM, *THE STRUCTURE OF ART* (1973); S. GABLIK, *PROGRESS IN ART* (1976).

15. Whitebook, *Saving the Subject: Modernity and the Problem of the Autonomous Individual*, 50 TELOS 79 (Winter, 1981-82).

Rights in general, and rights for workers in particular, constitute part of the achievement which Habermas conceives having an essential role to play in the resurrection of “practical reason” and the elaboration of an authentic socialist democracy.¹⁶ If it is Habermas’ intention to complete, rather than abandon, the Enlightenment, it remains nevertheless the purpose of the counter-enlightenment—here the postmodernists within critical legal studies—to secure a “holistic transformation of the modern project.”¹⁷ And that means, first of all, a systematic interrogation of the ideology of rights. Peter Gabel and Paul Harris, for example, argue that

[t]he point is not simply that rights-consciousness inherently implies the necessity of social antagonism (since rights are normally asserted against others). It is rather that this very way of thinking about people involves a bizarre abstracting away from one’s true experience of others as here with us existing in the world. An alternative approach to politics based on resolving differences through compassion and empathy would presuppose that people can engage in political discussion and action that is founded upon a felt recognition of one another as human beings, instead of conceiving of the political realm as a context where one abstract ‘legal subject’ confronts another. A genuinely socialist politics would presumably be based on such a view of group life, but many lawyers on the left insist that the use of rights-rhetoric remains necessary for effective political organizing today.¹⁸

To conceive of social progress in terms of rights enhancement, according to Gabel and Harris, is to poison the whole project in advance by embedding the vision of a better world within a politics whose central categories, by definition, reproduce the alienation of the individual from the community and of men and women from themselves. This general postmodernist rights analysis has so far only found one location of concrete application: labor law. Karl Klare, for example, argues that whatever social improvements may have been gained through the establishment and then extension of workers’ rights, have been undercut by the capacity of labor law ideology to “legitimate and justify unrec-

16. See Chase, *supra* note 13.

17. See Whitebook, *supra* note 15.

18. Gabel and Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y. UNIV. REV. OF LAW & SOC. CHANGE 369, 376 n.13 (1982-83).

essary and destructive hierarchy and domination in the workplace.”¹⁹ Without intending to demean “the heroism of American workers,”²⁰ Klare argues that post-New Deal labor law has induced “organized workers to consent to and participate in their own domination”²¹ and indicates that “liberal collective bargaining law is itself a form of political domination.”²² Referring to the “legislative analogy” (collective bargaining is disguised as a kind of legally neutral and politically equitable process),²³ Klare suggests that the ideology of labor law has helped workers to actually buy the notion that the system is democratic and encourages “worker acceptance of the supposedly ‘inevitable and eternal separation of industrial men into managers and the managed.’”²⁴

Agreeing with Klare’s critique of rights as cooptation and with his analysis of the ideological power of labor law, premier postmodernist Duncan Kennedy²⁵ regards post-World War II labor law “as a mechanism that coopts the working class and defuses class struggle.”²⁶ How does this “demobilizing ideology”²⁷ bring class struggle to a standstill? “The justifications offered for the rules” of labor law, asserts Kennedy, “disguise their repressive function in the language of industrial peace or workplace democracy.”²⁸ Apparently deceived by such ideological manipulation, the ideology of labor law causes workers to abandon their initial militancy and, worse, “. . . the working class itself, directly and through its intelligentsia, has been deeply implicated in the development of the rules and the elaboration of the justificatory ideology.”²⁹

There are two initial observations which should be made regarding the Gabel and Harris, Klare, and Kennedy ideology of rights thesis as applied within the labor law context. First, the critical labor jurispru-

19. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 IND. REL. L. J. 450, 452 (1981).

20. *Id.* at 481-482.

21. *Id.* at 455.

22. *Id.* at 452.

23. *Id.* at 458-59.

24. *Id.* at 459.

25. See Kennedy, *The Structure of Blackstone’s Commentaries* 8 BUFFALO L. REV. 205 (1979).

26. Kennedy, *Critical Labor Law Theory: A Comment*, 4 IND. REL. L. J. 503, 503 (1981).

27. *Id.* at 504.

28. *Id.*

29. *Id.*

dence seems to be quite uncharacteristically *instrumentalist* in nature. Labor law is pictured somewhat one-dimensionally, primarily through its deployment as an ideological instrument for more or less hammering the workers into shape. These critical legal theorists have generally been in the vanguard of *opposition* to the notion that law performs merely instrumental functions within society.³⁰ It would appear that an *absolute* hostility toward instrumental interpretations of law and society does not represent a defining characteristic of postmodernism within critical legal studies.³¹

Second, the critical labor jurisprudence is concerned with labor law primarily in order to help explain the general paralysis, as these postmodernist theorists see it, of the American labor movement. The political choices made by American workers over the last half-century, however, may not have been in any significant way the result of labor law ideology—at least according to some of America's most interesting labor historians. The portrait of American labor history projected onto the social canvas by the critical legal scholars is rather different from the one drawn by the labor historians.³²

Explaining the development of American trade unionism, the labor historians tend to emphasize (1) "the two-party system" of American politics where neither party was a labor party;³³ (2) "the universally held belief in the major tenet of private property";³⁴ (3) "the continued division of the American working class into separate ideological, ethnic,

30. See, e.g., Gabel and Harris, *supra* note 18, at 369 n.1; Klare, *Law-Making as Praxis*, 40 Telos 123, 128-133 (Summer, 1979); Kennedy, *Legal Education as Training for Hierarchy*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40, 46-50 (D. Kairys, ed. 1982).

31. See *supra* note 14.

32. See, e.g., D. MONTGOMERY, *supra* n.2; D. MILTON, THE POLITICS OF U.S. LABOR: FROM THE GREAT DEPRESSION TO THE NEW DEAL (1982); F. FOX PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL (1977); D. BRODY, WORKERS IN INDUSTRIAL AMERICA: ESSAYS ON THE TWENTIETH CENTURY STRUGGLE (1980); R. KEERAN, THE COMMUNIST PARTY AND THE AUTO WORKERS UNIONS (1980); A. MEIER & E. RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW (1979); P. FRIEDLANDER, THE EMERGENCE OF A UAW LOCAL, 1936-1939: A STUDY IN CLASS AND CULTURE (1975); WORKERS' STRUGGLES, PAST AND PRESENT: A "RADICAL AMERICA" READER (J. Green ed. 1983); B. COCHRAN, LABOR AND COMMUNISM: THE CONFLICT THAT SHAPED AMERICAN UNIONS (1977); WORKING-CLASS AMERICA: ESSAYS ON LABOR, COMMUNITY, AND AMERICAN SOCIETY (M. Frisch & D. Walkowitz, eds. 1983).

33. D. MILTON, *supra* note 32, at 106.

34. *Id.*

and religious groupings";³⁵ (4) "the ideology of nationalism" where "nationalism historically has had a long record of success in subduing ideologies based on class struggle";³⁶ (5) the willingness of most American Communists to subordinate the interests of American workers to the foreign policy of the Soviet Union which led to a separate peace with Roosevelt and business unionism during World War II;³⁷ (6) the anti-Communist inquisition in post-World War II America which decimated the leadership ranks of radical labor as well as the rest of American social and cultural life, irrespective of actual political party affiliation;³⁸ (7) the material, rather than ideological, consequences of labor laws such as the Taft-Hartley Act (1947) which "emasculated the Wagner Act" and "banned mass picketing, secondary boycotts, and sympathy strikes, all associated with the tactics of the social movement

35. *Id.*

36. *Id.* at 113.

37. *Id.* at 135-138. *But cf.* R. KEERAN, *supra* note 32, at 226:

During the 30 years since World War II, a conventional view of the war-time experience of Communists in the auto industry has developed largely through the work of such labor historians as Joel Seidman, Irving Howe, B.J. Widick, Art Preis, and most recently Bert Cochran, all of whom have written from a Trotskyist or Social-Democratic perspective. The conventional view holds that the left-wing caucus in the UAW, the caucus of the Communists and Secretary-Treasurer George Addes, lost influence during the war because the Communists and their allies sacrificed the immediate interests of the workers for the cause of victory over fascism. In this view the Communists made themselves unpopular by their ardent advocacy of incentive pay and the no-strike pledge. The conventional view also holds that the main reason the Communists were so willing to sacrifice the immediate interests of workers was because the 'prime allegiance' of the Communists was not to the workers but to the 'needs of the U.S.S.R.' Consequently, the right-wing caucus led by Walter Reuther, who opposed incentive pay and vacillated on the no-strike pledge, gained sufficient influence during the war to elect Reuther president of the UAW at the union's first postwar convention in 1946. The conventional view simplifies a complex and contradictory history in two major respects. . . .

Anyone wishing to write about the "complex and contradictory history" of the American labor movement during the past half-century (including the critical legal scholars) might well adopt Keeran's rigorous methodology.

38. See R. KEERAN, *supra* note 32; D. MILTON, *supra* note 32; B. COCHRAN, *supra* note 32. See also D. CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* (1978); S. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* (1982); A. KINOY, *RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE'S LAWYER* (1983); M. ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* (1967).

of industrial unionism identified with the CIO;³⁹ (8) a labor leadership crisis where “the vast majority of labor leaders accepted the system of corporate state capitalism”⁴⁰ and where “orientation of the unions toward management was facilitated by the severing of union leadership from dependence on the rank and file, first through their reliance on the federal government for membership gains, and then through the dues check-off”;⁴¹ (9) “dependence of the unions for their organizational ability on the well-being of the industry”⁴² accompanied by “a widespread erosion . . . in union membership and power”;⁴³ (10) that to “think only in terms of work relations . . . and union bureaucrats is to ignore the centerpiece of the game: the awesome power which a company wields over its employees.”⁴⁴

A methodological distinction between the critical labor theory’s explanation of American worker “demobilization” and that carefully riveted to the social experience of the American working class by the labor historians is that the legal scholars seem to ignore history—or at least the historians—altogether.⁴⁵ None of the contributing factors to

39. D. MILTON, *supra* note 32, at 159; *See also* D. MONTGOMERY, *supra* note 32, at 166-167; F. FOX PIVEN & R. CLOWARD, *supra* note 32, at 168-170; W.A. WILLIAMS, *AMERICANS IN A CHANGING WORLD* 391-392 (1978).

40. W.A. WILLIAMS, *supra* note 39, at 391.

41. F. FOX PIVEN & R. CLOWARD, *supra* note 32, at 160.

42. *Id.* at 159.

43. A.H. Raskin, noted labor journalist, quoted in D. BRODY, *supra* note 32, at 254-255.

44. D. MONTGOMERY, *supra* note 2, at 156.

45. Given their confidence that American workers are familiar with and coopted by the ideology of labor law, it is unfortunate that Klare and Kennedy ignore the writing of such workers-turned-historians as Stan Weir of San Pedro, California; *see supra* text; *see also* Weir, *Conflict in American Unions and the Resistance to Alternative Ideas from the Rank and File*, in J. Green, ed. *supra* note 32, at 251, 256-257 :

As soon as the employers accept collective bargaining as a fact of life and their signatures are put on contracts that they do not intend to break in other than a piecemeal way, the top labor leadership particularly must undergo a full change in attitude. For a time they may remain bitterly angry at some or all of the employers or their representatives, *but they must now show concern about the employers' competitive position.* . . . The open and total conflict relationship of the precontract days has to go. . . The ranks, however, do not share the change in attitude of their leaders. They too want to retain and maintain the contracts, but they see no reason for pulling back from a struggle to win a grievance that is legitimate. Their method for fighting a grievance is one of continued battle until won or lost. For moments at a time in the meetings down at the union hall it is possible

the shaping of the American labor movement mentioned above or the historical work from which the list is drawn are explored in the postmodernist critique of workers' rights and where they have led. Why should that be so?

I believe that the methodology deployed by the critical labor theo-

for them to see the logic of their leaders on the necessity to keep the company in business. *That reason is destroyed the moment they physically or mentally return to work.* The attitude of the company toward them is one of total antagonism and disrespect whenever the production process is in motion. Schizophrenia cannot live in a reality where there is so much immediate pain and unhappiness. (latter emphasis added).

See also comments made by Robert Gordon in an "unpublished summary of a first draft" at the 1979 national conference on critical legal studies in Madison, Wisconsin (on file at Nova Law Journal):

[I]t is perfectly reasonable to respond (as, for example, Duncan Kennedy and J.G.A. Pocock both do) that there is much basic work still to do in simply describing basic structures of thought and their transformations; and that such work is prerequisite to connecting the structures to the material world. But one can't help feeling that under this program the task of connection (*especially given the fondness of law trained people for doctrine*) is likely to be indefinitely postponed and that in the meantime tendentious connections (*like those of the instrumental schools*) will continue to be assumed. *Id.* (emphases added).

See also comments by intellectual historian Felix Gilbert in Gilbert, *Intellectual History: Its Aims and Methods*, 100 DAEDALUS 80, 94 (Winter, 1971):

Intellectual history cannot claim to be the true or only history; modern intellectual history arose after belief in the control of events by ideas had collapsed. It exists only in connection with, and in relation to, the surrounding political, economic, and social forces. The investigation of subjects of intellectual history leads beyond the purely intellectual world and *intellectual history per se does not exist.*

Id. (emphasis added). But see contra Klare, *supra* note 19, at 452 n.6: "It must be acknowledged that an important limitation of the critical labor law approach is its relative neglect, thus far, of the important task of drawing out empirically the interrelationships and connections between the *intellectual history* of collective bargaining law and the social history of the post-World War II labor movement." *Id.* (emphasis added).

Finally, it is instructive to observe the contradictory relation between Duncan Kennedy's sophisticated and enormously compelling portrait of the forces shaping American law student (and legal professional) consciousness with his critique of organized labor consciousness; See D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983). The equivalent of Kennedy's analysis of labor law ideology within the law school context would be the assertion that law students are politically demobilized primarily by the ideology of student honor codes. Avoiding such errant reductionism within the law school context, Kennedy drives home a critique literally unmatched anywhere by anybody.

rists has *not* been to systematically study the history of American labor—then labor law—and come to the conclusion that the importance of labor law ideology in “demobilizing” the working class has been insufficiently emphasized by other labor scholars. On the contrary, the purpose of the critical labor jurisprudence seems to be the advancement of the postmodernist critique of law generally and rights in particular—rather than an elaboration of the historical structure of material as well as ideological forces shaping the American labor movement. Thus the disinterest in existing American labor historical research becomes easier to understand.

This does not mean, of course, that the postmodernists within critical legal studies are without some fascinating insights. As long as “us” is understood to mean no one in particular, it is appropriate to argue that the critical labor jurisprudence shows how “[b]y inducing us to believe that existing institutions and patterns of social thought are natural, rational, or necessary, legal discourse inhibits our ability to perceive the contingency of present arrangements—the extent to which they are created and sustained by human choice.”⁴⁶ But this general theoretical achievement is not the same thing as a demonstration that identifiable members of the organized working class see themselves and their struggles primarily through the optic of labor law ideology. None of the postmodernist critique of law has yet proved that workers should

46. Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475, 475-476 (1983). At one point, the author suggests that “[a]s we invent ever more sophisticated stories to delimit the spheres of state power and individual freedom, we (*judges, lawyers, scholars, student note-writers*) reproduce a social meaning system that obscures and denies the complex, dense textures of social life.” *Id.* at 493 (emphasis added). Entirely without fanfare, Klare’s and Kennedy’s “demobilized” working class has become an ideologically mesmerized ensemble of lawyers and law professors. It would appear that the victims of labor law ideology according to the latest version of the critical labor jurisprudence no longer include longshoremen like Stan Weir or the rest of the American working class either (unless labor law judges are now seen as a kind of “new working class”). Unless the postmodernists are prepared to develop a social theory of the intelligentsia, they should return to the “workers as victims” version and (as Klare indicates) start talking about American “social history.” See M. Meisner, *The Defection of the Intellectuals in MAO’S CHINA: A HISTORY OF THE PEOPLE’S REPUBLIC* (1977); M. MEISNER, *LI TA-CHAO AND THE ORIGINS OF CHINESE MARXISM* (1967); G. KONRAD AND I. SZELENYI, *THE INTELLECTUALS ON THE ROAD TO CLASS POWER: A SOCIOLOGICAL STUDY OF THE ROLE OF THE INTELLIGENTSIA IN SOCIALISM* (1979); A. GOULDNER, *THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS* (1979).

not pursue a systematic expansion of their legal rights—or why Americans should not press for adoption of the IAM bill of workers' rights.⁴⁷

47. Really damaging opposition to workers' rights comes, of course, not from postmodernism within critical legal studies but from *capital* in the social world. See M. GIBSON, WORKERS' RIGHTS (1983); P. SIMON, REAGAN IN THE WORKPLACE: UNRAVELING THE HEALTH AND SAFETY NET (1983); *Reagan's NLRB: Crisis in Labor Law*, 7 GUILD NOTES 3 (Nov.-Dec. 1983); Aronowitz, *Two, Three, Many Greyhounds?*, NATION 624 (Dec. 17, 1983); Mann, *Workers and Community Take on G.M.*, NATION 145 (Feb. 11, 1984); Schmiechen, et. al., *Waking from the American Dream*, NATION 241 (March 3, 1984); Egan & Noble, *The Lab Worker's Lonely Victory*, NATION 350 (March 24, 1984); Early, *A New Generation of Labor Leftists*, NATION 542 (May 5, 1984).

An Examination of Issues in the Florida Sentencing Guidelines

I. Introduction

Reformers have reshaped the theory of sentencing in the United States during the last decade,¹ responding to the realization that rehabilitation as a primary goal of sentencing is not realistic.² Prior to the 1970s, rehabilitation was seen as the ultimate aim of the penal system. Rehabilitation involves the use of sentencing to isolate and reform offenders, thereby reducing crime.³ But "correctional institutions" did not rehabilitate,⁴ and the rehabilitation goal began to lose favor among commentators around 1970.⁵ Extremely overcrowded surroundings, brutality, intra-inmate violence, filthy conditions, lack of medical attention, and negative psychological effects from long term incarceration are among the reasons for prisons' failure to rehabilitate.⁶

1. A. SUNDBERG, A REPORT TO THE LEGISLATURE. STATEWIDE SENTENCING GUIDELINES IMPLEMENTATION AND REVIEW (1982); *See generally* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); W. RICH, C. SUTTON, T. CLEAR, M. SAKS, SENTENCING BY MATHEMATICS: AN EVALUATION OF THE EARLY ATTEMPTS TO DEVELOP AND IMPLEMENT SENTENCING GUIDELINES xvii (1982); C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 502-74 (1978); R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT (1979); A. VON HIRSCH, DOING JUSTICE (1976); G. CAVENDER, *The Philosophical Justifications of Determinate Sentencing*, 26 AM J. JURIS. 157 (1981); and Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, DUKE L. J. 1103 (1980).

2. N. KITTRIE and E. ZENOFF, SANCTIONS, SENTENCING AND CORRECTIONS 49-54 (1981); Greenberg and Humphries, *The Cooptation of Fixed Sentencing Reform*, CRIME & DELING., April 1980, at 206 [hereinafter cited as Greenberg].

3. Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, DUKE L. J. 1103, 1199(1980).

4. C. SILBERMAN, *supra* note 1, at 504. Silberman quotes the 1967 Crime Commission: "Indeed, experts are increasingly coming to feel that the conditions under which many offenders are handled, particularly in institutions, are often a positive detriment to rehabilitation." *Id.*

5. *See* Gardner, *supra* note 3, at 1103, Greenberg, *supra* note 2, at 207 and R. SINGER, *supra* note 1, at 1-10.

6. Crump, *Determinate Sentencing: The Promises and Perils of Sentence Guidelines*, 68 KY. L.J. 1, 28-33 (1977-80). C. SILBERMAN, *supra* note 1, at 502-74.

Prisoner unrest caused by blatant disparity in sentencing additionally contributed to the need for reform. Criminals with similar records who committed the same crime received greatly varied sentences.⁷ Moreover, uncertain sanctions created a sense of anxiety in the prisoners. "[I]t becomes increasingly apparent that the very indeterminacy of indeterminate sentences is a form of psychological torture."⁸ The rehabilitative model utilized an indeterminate sentencing system in sentencing the offender, where the parole board controlled an inmate's future by determining his release date based on his behavior. Under this system, the sentences necessarily covered a broad period of time. For example, a typical indeterminate sentence would be five to twenty years. Given this latitude, the parole board could select the "magic moment" when a criminal [was] rehabilitated."⁹ However, the task of ascertaining that moment, if that moment ever occurred at all, was almost impossible.¹⁰ The Federal Parole Commission frankly admits that accurately selecting the critical moment when a prisoner is ready for release is beyond their capabilities.¹¹

The rehabilitative system somehow allowed the "inequalities of wealth and power"¹² to determine sentences more than the defendant's blameworthiness or the moral turpitude of the crime itself.¹³ The criminal justice system's over-optimistic rehabilitative ambitions resulted from and was perpetuated, in part, by sentencing uncertainty and disparity. Since there are financial obstacles and practical complications inherent in revising the penal system toward effective rehabilitation, legislators and judicial officials opted to alleviate one aspect of the problem by restructuring sentencing procedures and policies. A shift from a rehabilitative philosophy to one of "just deserts"¹⁴ resulted. Just

7. A. VON HIRSCH, *supra* note 1, at 72-74; Greenberg, *supra* note 2, at 208.

8. Alshuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 UL. PA. L. REV. 550, 553 (1978). See also Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237, 237 (1980); GARDNER, *supra* note 3, at 1109; and von Hirsch, *Constructing Guidelines for Sentencing: The Critical Choices for the Minnesota Guidelines Commission*, 5 HAMLINE L. REV. 164, 176-77 (1982).

9. Alschuler, *supra* note 8, at U. COLO. L. REV. at 238.

10. *Id.*

11. *Id.*

12. Greenberg, *supra* note 2, at 208.

13. *Id.*

14. Wilkins, *Sentence Guidelines to Reduce Disparity?*, CRIM.L. REV. 201, 205 (1980).

deserts, or retribution, as a purpose for sentencing entails the theory that the offender has violated "societal rules and must be 'punished' in order that he or she receives just deserts."¹⁵

The Florida Sentencing Guidelines are based on this philosophy.¹⁶ The guidelines¹⁷ took effect on October 1, 1983. The greatest change from the old system of sentencing was the seemingly shorter sentence lengths. This reduction resulted from the abolition of parole release, and the imposition of sentences decreased only by gain time.¹⁸ Rather than lengthy sentences determined by a judge and subject later to the Parole Commission's discretion, a felon's "composite score"¹⁹ is calculated, based on the offenses at conviction, prior record, legal status at the time of the offense and extent of victim injury, where pertinent.²⁰ This score determines a narrow range of "presumptive sentences"²¹ which are "assumed appropriate"²² for the offender. Provision is made for departure from the guidelines at the judge's discretion, but such departures require written explanation.²³ The guideline sentences apply to all felonies, excluding capital offenses and those with mandatory sentences, committed after October 1, 1983.²⁴ Felons sentenced after that date whose crimes were committed prior to it, may affirmatively choose to have the guideline sentence imposed.²⁵

This note summarizes and critiques the philosophy and formulation of the Florida Sentencing Guidelines, their strengths and some potential problems. It analyzes circumstances under which departures from the presumptive sentences are allowed. It addresses the question of the Guidelines' constitutionality, raising and predicting the probable outcome of various challenges. The Minnesota Sentencing Guidelines served in part as a prototype for Florida's Guidelines.²⁶ Because of the

15. N. KITTRIE and E. ZENOFF, *SANCTIONS, SENTENCING AND CORRECTIONS - LAW, POLICY AND PRACTICE* 14 (1980).

16. *In re Rules of Criminal Procedure (Sentencing Guidelines)*, 439 So. 2d 848 (Fla. 1983).

17. FLA. R. CRIM. P. 3.701 and form 3.988.

18. FLA. R. CRIM. P. 3.701(b)(5).

19. FLA. R. CRIM. P. 3.701(d)(8).

20. FLA. R. CRIM. P. 3.988(a)(i).

21. FLA. R. CRIM. P. 3.701(d)(8).

22. *Id.*

23. FLA. R. CRIM. P. 3.701(b)(6) and (d)(11).

24. *Sentencing Guidelines*, 439 So. 2d 848.

25. *Id.*

26. The motivation for the final stages of the construction of the Florida Sentencing Guidelines was described by Robert Wesley, Staff Counsel for the Florida Sentencing

similarities between the two, this note will present a survey of the cases interpreting that state's guidelines, so as to aid in understanding the effects these new Florida guidelines will have.

II. Development of the Guidelines

A. Early Interest

Florida's sentencing reform began in January of 1978 when the Chief Justice of the Florida Supreme Court appointed a committee "to examine the extent and causes of sentence disparity and to explore the variety of sentence alternatives available—judicial, legislative, and administrative—to reduce unreasonable sentence variation."²⁷ This sentencing committee consisted of judges, professors and legislators, to ensure a thorough examination of the repercussions of change in the criminal justice system.²⁸

The primary goal of the committee was "to devise a system where individuals of similar backgrounds would receive roughly equivalent sentences when they commit similar crimes, regardless of the different penal philosophies of legislators, correctional authorities, parole authorities, or judges."²⁹ The committee examined the various reforms emerging in the country and the felony sentencing practices in use in the state.³⁰ In its Interim Report,³¹ the committee recommended,

in principle, the exercise of judicial discretion in the sentencing process. However, in order to achieve a greater degree of consis-

ing Guidelines Commission, as coming from the Minnesota Sentencing Guidelines. These guidelines bear many similarities to the completed Florida guidelines. See generally von Hirsch, *supra* note 8, for a complete description and analysis of the Minnesota Guidelines.

27. Sundberg, Plante and Palmer, *A Proposal for Sentence Reform in Florida*, 8 FLA. ST. U. L. REV. 1, 1-2 (1980). This reform was spurred by the current reform in the United States in general and by several sources specifically. Among these specific influences was L. WILKINS, J. KRESS, D. GOTTFREDSON, J. CALPIN and A. GELMAN, SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION, REPORT TO THE FEASIBILITY STUDY (1976) cited in A. SUNDBERG, *supra* note 1, at 42 n.1.

28. Sundberg, Plante & Palmer, *supra* note 27, at 2, 3.

29. *Id.* at 3.

30. A. SUNDBERG, *supra* note 1, at 3.

31. *Id.* at 4, 44 & n.12, citing *Interim Report of the Sentencing Study Committee to the Florida Supreme Court* (1978) (available from the Office of the State Courts Administrator at the Florida Supreme Court).

tency and fairness in the sentencing process throughout the state, the committee recomend[ed] the development of structured sentencing guidelines in combination with a sentencing review panel that would operate within the sentence parameters prescribed by the Legislature.³²

B. Multijurisdictional Sentencing Guidelines Project

In 1974, the National Institute of Law Enforcement and Criminal Justice³³ (NIJ) and the Law Enforcement Assistance Administration (LEAA) funded a study to determine the feasibility of drafting and utilizing sentencing guidelines.³⁴ The resulting study encouraged an extension of the project on a multijurisdictional level. Four years later, Florida became part of the project.³⁵ Four Florida judicial circuits were specifically selected as sites for the pilot program. The specific circuits were chosen for several reasons, including: 1) the availability and com-

32. *Id.* Sentencing guidelines are inherently different from other forms of sentencing reform. States such as California, Maine, Illinois, and Indiana now use "determinate sentencing" schemes, which involve little or no judicial discretion. There are three basic types of determinate sentencing schemes: mandatory or minimum-mandatory sentencing, flat time sentencing, and presumptive sentencing. Guidelines are most similar to the presumptive model (though often the distinctions between all categories are blurred), in that the trial judge has a limited range of sentences from which to select, and aggravating or mitigating factors can vary the range. The difference between the two lies in the greater amount of discretion the judge has under sentencing guidelines. Whereas a presumptive system merely provides a judge with a new presumption in the presence of an aggravating or mitigating circumstance, the guidelines allow a judge total freedom in administering the sentence, once he determines that such a circumstance exists. The judge using guidelines may also deviate for reasons relating to the defendant, rather than only to the offense itself, as he would be restricted under most presumptive systems. This greater amount of discretion can be viewed as either good or bad, depending upon one's confidence or skepticism in judges' ability to judge fairly. *Id.* at 2, 3 and accompanying notes.

33. Now the National Institute of Justice, A. SUNDBERG, *supra* note 1, at 44, n.13.

34. Plante, Abernathy, Salokar and Kern, *Judicial Sentencing - Help is on the Way*, FLA. BAR. J. 536, 537 (1981).

35. Together the NIJ and LEAA awarded \$270,000 to the Office of the State Court's Administrator for testing the Guidelines in four of Florida's twenty Circuits. The circuits tested were the 4th (consisting of Clay, Duval, and Nassau Counties) the 10th (Hardee, Highland, and Polk Counties) the 14th (Bay, Calhoun, Gulf, Holmes, Jackson and Washington Counties) and the 15th (Palm Beach County). *Id.* at 536, 537.

pleteness of sentencing records, 2) the relationship between presentence investigation reports and sentencing decisions, 3) the mixture of rural and urban areas, 4) the variety of political and social values reflective of the state as a whole and 5) the judges' agreement to cooperate with and participate in the one-year implementation period.³⁶ An advisory board from each circuit oversaw the progress of the project. The boards consisted of the chief judge (or his representative) and eight other members from each of the four jurisdictions, reflecting a desire for a diverse group of experts.³⁷

C. The Historical Model

In the initial formulation of the guidelines, the past sentencing practices of Florida judges served as a basis for determining sentence ranges for various crimes. This historical approach resulted in a model which represented what sentencing *had been*, rather than what it *ought* to be. Advisory boards were provided with a sampling of felony cases concluded during the three previous years, thus insuring a variety of judges' decisions, and encompassing a broad range of cases.³⁸ In all, 15,613 cases were sampled, consisting of 194 different criminal offenses. Some offenses occurred far more frequently than others with sixty-five statutes making up eighty-five percent of the felony caseload. These sixty-five statutory offenses were categorized into six groups, by similarities among "offense and offender characteristics."³⁹ Statutory violations not occurring within this eighty-five percent portion were not analyzed further.⁴⁰

36. A. SUNDBERG, *supra* note 1, at 5.

37. OFFICE OF THE STATE COURTS ADMINISTRATOR, MULTIJURISDICTIONAL SENTENCING GUIDELINES PROJECT, FINAL REPORT 3 (1982) [hereinafter cited as FINAL REPORT].

38. *Id.* at 4.

39. A. SUNDBERG, *supra* note 1, at 6, 7.

40. *Id.* at 7. One hundred twenty nine statutes comprised the remaining 15% of the felony cases. The advisory board felt the infrequency of these occurrences demanded the individualized attention of the trial judge and chose to leave it entirely to his discretion. *Id.* at 7 & n.18. The offense categories were: Category 1: Murder, Manslaughter, Kidnapping, Lewd and Lascivious Assault; Category 2: Aggravated Assault, Aggravated Battery, Battery of Law Enforcement Officer; Category 3: Burglary with Assault, Burglary of an Occupied Dwelling, Structure or Conveyance, Robbery; Category 4: Armed Robbery, Burglary of an Unoccupied Dwelling, Structure or Conveyance; Category 5: Grand Larceny or Theft, Dealing in and Receiving Stolen Property, Forgery, Worthless Checks; Category 6: Possession, Sale, Delivery, Importation of a Controlled

From the eighty-five percent group, a random sample of 6,826 cases was taken, of which 5,100 were coded and analyzed.⁴¹ Information variables were compiled and statistically analyzed to identify decision making factors historically used by judges.⁴² The advisory boards then qualitatively analyzed these factors, to prevent the continued use of undesirable and inappropriate variables from being factored into the guidelines.⁴³ The remaining sentencing factors were used to develop a mathematical model for explaining the sentencing practices historically used in the four jurisdictions.⁴⁴

This process of eliminating inappropriate or undesirable factors constitutes something of a compromise in the underlying rationale or policy of the guidelines. The Florida Sentencing Guidelines, though similar in many ways to the Minnesota guidelines,⁴⁵ do not adhere to

Substance. *Id.* at 8.

41. *Id.* at 9. Problems in locating files and the files' incompleteness precluded using the other 1726 cases.

42. *Id.* at 10. The records used for this information included pre and post sentence investigation reports, prison admission documentations and criminal history records, or "rap sheets."

43. *Id.* at 11. Among the factors eliminated were: "Lack of Remorse" and "Extent of Victim Scarring or Disfigurement". These factors were deemed highly subjective and too difficult to quantify in a general fashion. They may properly influence a judge, but must do so on a case by case basis. "Victim's sex" should not make any difference in sentencing, but the relative sizes and physical appearances may be considered. *See Id.* at 12-14. "Number of Dependents" was characterized as "having no place in the sentencing process", and the "Type of Victim", whether an individual, business, or government. . . should not make a difference." *Id.* at 16, 17.

44. *Id.* at 19. For a description of the model see *id.* at 19, 20. *Cf.* W. RICH, C. SUTTON, T. CLEAR, M. SAKS, *supra* note 1, at 33-89.

45. Both Minnesota and Florida have provisions prohibiting the use of factors related to offenses for which convictions have not been obtained. Both delete first degree murder from the guidelines because of a statutorily mandatory sentence. The statements of purpose of each run along similar principles: the first in each requires that "[s]entencing should be neutral with respect to . . . race, gender. . . social. . . economic status", Florida's 3rd and 4th principles and Minnesota's 2nd provide that punishment should increase with the severity of the offenses and the offender's criminal record. Florida's 6th principle and Minnesota's 4th provide that the guidelines prescribed sentence should be imposed unless exceptional ("clear and convincing" in Florida, and "substantial and compelling" in Minnesota) circumstances exist. Florida's 7th and Minnesota's 3rd principles provide, "[b]ecause the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive necessary to achieve the purpose of the

Minnesota's ultimate decision to completely reject the historicist approach.⁴⁶ There, the Sentencing Commission considered analyzing past practices of judges to develop the guidelines, but they determined that the mere elimination of inappropriate factors would distort the relative weights to be assigned to the more appropriate relevant factors.⁴⁷ Moreover, the strictly historical approach was seen as evading such important issues as why certain crimes are punished more severely than others, and whether more severe punishment is warranted. Minnesota therefore adopted the policy of taking an active role in deciding which sentencing considerations should be taken into account, how much weight to assign to each consideration, which sentencing aims should be targeted⁴⁸ and, perhaps most importantly, the seriousness of different offenses.⁴⁹

This last task of evaluating offenses reflects a major difference between Florida's original guidelines, as used in the pilot program, and Minnesota's guidelines. Minnesota's Commission utilized rating technique based on its own personal and collective judgments, to determine the seriousness of various crimes. The Minnesota Commission thereby reevaluated crime categories and rated them accordingly. Such rating reflects an important step toward making a reasoned judgment about the relative moral turpitude of various classifications of crimes. To historically analyze legislative or judicial decisions would sacrifice a consistent and express rationale. Similarly, reliance upon a public poll would risk maintenance of a haphazardly and ill-founded tradition which lacks a reasoned coherence.⁵⁰

In the Florida pilot program guidelines, this sacrifice was indeed made. Thus, the severe sentences of notoriously controversial crimes, such as possession or sale of small amounts of marijuana or cocaine, remained virtually untouched by the guidelines. Reliance upon purely historical data, and only deleting "variables deemed inappropriate for use in sentencing"⁵¹ maintained the underlying qualitative evaluation of offenses for which the defendant was charged. Therefore, although the guidelines "represent[ed] a prescriptive model of what factors

sentence." FLA. R. CRIM. P. 3.701 and MINN. STAT. app. § 244 (1983).

46. von Hirsch, *supra* note 8, at 175.

47. *Id.* at 174.

48. *Id.* at 174, 75

49. *Id.* at 175, 197, 198,

50. *Id.* at 197, 198.

51. S. SUNDBERG, *supra* note 1, at 11.

'should' be considered in the sentencing process,"⁵² the benefit of critically reevaluating those sentencing practices as they relate to the distinct substantive areas of crime was forfeited.

With the aid of the historical data, a mathematical model was used to construct six separate guidelines, one for each offense category. After training seminars were held for members of the bar and bench, clerks and probation personnel,⁵³ these guidelines were used in the pilot program in the four jurisdictions.⁵⁴ Florida Supreme Court Chief Justice Sundberg and the staff⁵⁵ visited the participating jurisdictions during the pilot program.⁵⁶ The committee made revisions accordingly⁵⁷ and analyzed the guidelines "scoresheets."⁵⁸

The committee then recommended the creation of a "sentence review panel"⁵⁹ to review sentences outside the guidelines. Nonetheless, during the pilot program, the sentences imposed were not subject to any formal review.⁶⁰ Direct review of sentences was not part of Florida's appellate system and appeals could not be allowed in only four jurisdictions.⁶¹ However, the committee felt sentence review was a "key

52. *Id.* at 20.

53. FINAL REPORT, *supra* note 37, at 23-25.

54. In addition to the concerns mentioned above, other criticisms included: 1) the sentences were either too harsh or too lenient, 2) the decrease in disparity was undesirable in that the variation is merely an expression of local mores, 3) the judges may not be able to use enough discretion, 4) the defendant's prior record was not given enough attention, 5) mitigating factors needed to be identified and 6) the guidelines were too "negative[ly]" oriented. *Id.* at 25, 26.

55. The guideline staff consisted of Donna L. Braziel and Kenneth J. Plante, Project Directors, Susan K. Wilson, Data Entry Supervisor, and Doris Puffer, Secretary. *Id.* at second unnumbered page.

56. *Id.* at 25.

57. *Id.* at 23-25. The "scoresheets" are used to determine the presumptive sentence range. "Points are assigned for various offense and offender related characteristics and total score calculated. This score is then used to enter a one-dimensional matrix with score ranges correlated to sentences. The median sentence figure is recommended, accompanied by a minimum and maximum range which may be imposed at the discretion of the Court." *Id.* at 21.

58. *Id.* at 22. For a complete description of this process, including project data, graphs and charts, see Sundberg, Plante, and Braziel, *Florida's Initial Experience with Sentencing Guidelines*, 11 FLA. ST. L. REV. 125 (1983) and FINAL REPORT, *supra* note 37.

59. A. SUNDBERG, *supra* note 1, at 31-36.

60. FINAL REPORT, *supra* note 37, at 21. *But see*, Layton v. State, 432 So. 2d 195 (Fla. 1st Dist. Ct. App. 1983).

61. FINAL REPORT, *supra* note 37, at 21

element in the entire concept of sentencing guidelines."⁶² Therefore, the finalized guidelines recognize departures from the guidelines as a ground for appeal by either the state or defendant.⁶³

D. Florida Sentencing Guidelines Commission

Chief Justice Sundberg recommended creation of a sentencing commission to develop and periodically revise statewide guidelines.⁶⁴ Accordingly, the legislature enacted section 921.001 of the Florida Statutes on April 7, 1982 approving his recommendation.⁶⁵

The Commission created by this statute was not required to report on the "exact mechanism/methodology used to develop and implement the guidelines,"⁶⁶ so that most of the changes from the original guidelines used in the pilot program are left unexplained. For example, the finalized guidelines have nine offense categories, as opposed to six in the pilot program.⁶⁷ Apparently the Committee saw the need to redefine these categories more specifically to correct overbroad classifications of offenses.⁶⁸ Although the minutes of the Commission meetings reflect these changes, no particular reasons are cited to explain the alterations. In the finalized guidelines, many of the same procedures for determining sentences were used as in the original guidelines. As in the originals, statistical analysis was employed to develop a mathematical model for the guidelines.⁶⁹ The Commission then developed the guidelines by utilizing the statistical data provided by the project as to past sentencing practices.

62. *Id.*

63. FLA. STAT. § 921.001(2) and (3) (1983) (amending FLA. STAT. § § 924.06 and 924.07 (1983)).

64. A. SUNDBERG, *supra* note 1, at 36-41.

65. FINAL REPORT, *supra* note 37 at 34 and text of bill at Appendices a, A-1 - A-3.

66. A. SUNDBERG, *supra* note 1, at 39.

67. *Cf. supra* note 40 and FLA. R. CRIM. P. 3.988(a)-(i).

68. The compliance rate for certain categories was much lower than others. *See* A. SUNDBERG, *supra* note 1, at Appendix C.

69. The Commission randomly selected 3,977 felony cases from 58,000 convictions filed in 1981. Criminal history records, or "rap sheets," pre- and post-sentence investigation reports and admission summaries were used to code 233 variables. The staff then analyzed these variables to determine which ones accounted for the length and type of sentence. Introduction to FLORIDA SENTENCING GUIDELINES COMMISSION, GUIDELINES MANUAL (1983) [hereinafter cited as MANUAL].

III. The Florida Sentencing Guidelines

A. Philosophy

In July 1983, the Sentencing Guidelines Commission released drafts of the finalized guidelines, including a statement of purpose, committee notes, and comments.⁷⁰ A draft was published in the Florida Bar News,⁷¹ and was later approved by the Florida Supreme Court⁷² after final modifications. The Commission adopted a retributive philosophy in fashioning the guidelines: "[t]he primary purpose of sentencing is to punish the offender. Rehabilitation and other traditional considerations continue to be desired goals. . . but must assume a subordinate role."⁷³ Additionally, the guidelines provide for harsher punishments for recidivists than for first offenders. The more numerous and severe in nature the past convictions, the more severe incarcerative sanctions will be.⁷⁴ Practical considerations were also woven into the guidelines, by making an *a priori* decision to extend the scope of the guidelines to "serve as a mechanism for dealing with prison overcrowding. . . ."⁷⁵ The commission recognized that "[b]ecause the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to those persons convicted of more serious offenses or those who have longer criminal histories. To ensure such usage of finite resources, sanctions used in sentencing convicted felons should be the least restrictive possible."⁷⁶

The policy of including prison capacity as a consideration for designing the guidelines is another point where the Florida Commission followed the lead of the Minnesota guidelines.⁷⁷ Although some authorities contend that this policy is an ethical consideration, since it is "simply wrong to sentence people to overcrowded prisons,"⁷⁸ the ethical problem results from an economic dilemma. The problem of overcrowded prisons can be solved in several ways, including building more

70. *Id.*

71. 10 FLA. B. NEWS 14, 5-7. See also accompanying article Orrick, *Court Receives Sentencing Guidelines*, *Id.* at 1, 7-9.

72. *Sentencing Guidelines*, 439 So. 2d 848.

73. MANUAL, *supra* note 69, at 3.

74. FLA. R. CRIM. P. 3.701(b)(4).

75. MANUAL, *supra* note 69, at Introduction.

76. FLA. R. CRIM. P. 3.701(b)(7).

77. See von Hirsch, *supra* note 8 at 176-80.

78. *Id.* at 176.

prisons, incarcerating fewer people, or releasing more prisoners by parole. However, authorities meet with difficulties regarding the first option; they are faced with political factions unwilling or unable to convince the public that more funding needs to be appropriated for more prisons.⁷⁹ Once this alternative has been eliminated because of monetary concerns, it becomes a matter of ethics to decide who is most in need of incarceration, and who society should continue to have in its midst. Ethical considerations necessarily involve reevaluating the blameworthiness of various classifications of substantive crimes. The Commission therefore incorporated ethical and practical concerns into the finalized guidelines.⁸⁰ Controversial crimes such as prostitution, drug offenses, and other victimless crimes, were deliberated at length and reappraised on a normative level. Hence, the decision to base sentences on the "length and nature of the offender's criminal history,"⁸¹ the "severity of the convicted offense,"⁸² as well as the capacity of prisons⁸³ manifest moral and economical considerations. A brief in opposition to the guidelines filed with the Florida Supreme Court before their final approval criticized the Commission for considering prison capacity in sentencing. "We maintain that the safety, and emotional and physical well being of our society must be paramount to concerns about jail overcrowding."⁸⁴

79. More importantly, even if funding were appropriated, it is doubtful whether this would solve the problem. Florida is already the "most incarcerative state in the nation, imprisoning a greater percentage of its population than any other state." Lohman, *Florida's Overcrowded Prisons, too little space or too many people?*, FLA. B. J., April 1983, at 199. Twelve major prisons have been built since 1974. *Id.* Nonetheless, this high rate of incarceration apparently has no deterrent effect on the commission of crime. *Id.* at 201.

80. von Hirsch, *supra* note 8, at 179.

The Minnesota Commission made the existing prison capacities decisive of the aggregate use of imprisonment under the Guidelines. The normative questions, for the Commission, were those of allocation: with classes of convicted prisoners, for how long, and for what reasons, should be allocated to this prison bedspace? The aggregate use of imprisonment was thus decided on the basis of what facilities were in fact available. The Commission did not make a normative judgment about how much, apart from the availability of resources, the state *ought* to rely upon the prison sanction.

Id. (Emphasis in original.)

81. FLA. R. CRIM. P. 3.701(b)(4).

82. *Id.* at (b)(3).

83. *Id.* at (b)(7).

84. M. Satz, R. Stone, E. Whitworth, K. Zuelch, J. Appleman, R. Eagan, J.

The guidelines are intended to serve as a standard to aid the sentencing judge in the decision-making process.⁸⁵ "However, while structuring judicial discretion, the guidelines are sufficiently flexible to permit the judge to tailor the sentence to the individual offender."⁸⁶ This standard should then "eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense- and offender-related criteria and in defining their relative importance in the sentencing decision."⁸⁷ The sentencing judge is thus provided with a narrow range of recommended sentences from which to choose.

B. Judicial Discretion to Depart from the Guidelines

To depart from a guideline-imposed sentence, the circumstances of a case must *clearly and convincingly* warrant aggravating or mitigating the sentence.⁸⁸ There is no defined list of appropriate aggravating or mitigating factors;⁸⁹ consequently, judges are free to read the entire record and develop their own reasons to shorten or lengthen the sentence beyond the guidelines' range. The Committee comment states that each criminal case is unique, so that a comprehensive list of aggravating and mitigating circumstances is not given.⁹⁰ However, by excluding specific factors, the Commission risks allowing judges to stray from the policy of the guidelines and create a judicial doctrine different from the guidelines' underlying purpose.⁹¹ A judge need only make a written statement explaining why he departed from the guidelines.⁹² Such a statement becomes part of the record, and should be specific enough to inform all parties and the public why departure was necessary.⁹³ This written statement need not be a lengthy discussion—often two or three words will suffice to explain. Allowing the procedure to be simple, however, increases the opportunity for discretion. The sentencing study committee commented:

Gardner, D. Modesitt and C. Golden, Petitioners Brief in Opposition, Rules of Criminal Procedure (Rule 3.701) Sentencing Guidelines, Case No. 63,962, at 5 (1983).

85. FLA. R. CRIM. P. 3.701(b).

86. MANUAL *supra* note 69, at Introduction 2.

87. FLA. R. CRIM. P. 3.701(b).

88. *Id.* at (b)(6) and (d)(11).

89. MANUAL, *supra* note 69, at 10, comment to 11.

90. *Id.*

91. *See* von Hirsch, *supra* note 8, at 205.

92. FLA. R. CRIM. P. 3.701, Committee Note (d)(11).

93. *Id.*

Although the purpose of sentencing guidelines is the reduction of unwarranted sentence variation, the need for some variation is recognized and is indeed promoted. It is anticipated that that from 15-20% of the sentencing decisions will routinely fall outside of the recommended range. At no time should sentencing guidelines be viewed as the final word in the sentencing process. . . . The specific circumstances of the offense may be used to either aggravate or mitigate the sentence within the guideline range or, if the offense and offender characteristics are sufficiently compelling, used as a basis for imposing a sentence outside of the guidelines.⁹⁴

Predictions have proved to be correct; 81.1% of the cases in the pilot program were in fact within the sentence range recommended by the guidelines.⁹⁵ There is no evidence of how representative this compliance rate will be because of changes in the guidelines and implementation throughout the entire state. Factors such as the willingness and commitment of the judges in the pilot program to cooperate with the guidelines project, the knowledge that appeals were not possible in the pilot program, and restructuring of the new guidelines themselves⁹⁶ may affect compliance on a statewide level.⁹⁷

The fear that the just-deserts policy of the guidelines would be contravened by not supplying aggravating and mitigating factors to judges was recognized and acted upon by Minnesota.⁹⁸ There, the guidelines include a non-exclusive list of reasons appropriate for departure,⁹⁹ as well as a list of factors inappropriate to justify departure.¹⁰⁰ Appropriate reasons for departure go to the nature of the offense itself, rather than to the offender; inappropriate reasons for departure relate specifically to the offender's personal and social status.¹⁰¹

Minnesota's reasoning seems consistent with its choice to advocate

94. A. SUNDBERG, *supra* note 1, at 22.

95. FINAL REPORT, *supra* note 37, at 30.

96. For changes from the pilot program to the final guidelines, *see supra* notes 64-69 and accompanying text.

97. See FINAL REPORT, *supra* note 37, at 30 and Appendix F for compliance rate information.

98. von Hirsch, *supra* note 8, at 205-07.

99. MINN. STAT. ANN. § 244 II. D. 2(a) and (b) (West Supp. 1982), reprinted in 5 HAMLINE L. REV. 395 (1982) [hereinafter cited as GUIDELINES, HAMLINE].

100. MINN. STAT. ANN. § 244 II D. 1(a)-(e) (West Supp. 1982). *See also* GUIDELINES, HAMLINE, *supra* note 99.

101. *See supra* notes 99-100 and accompanying text; von Hirsch, *supra* note 8, at 206, 207.

a "modified just-desert"¹⁰² rationale as opposed to one of rehabilitation.¹⁰³ Given the just-desert/incapacitative philosophy, factors such as employment history, the impact of the sentence on occupation or profession, and marital status are deemed irrelevant to the retribution that should be made for a particular offense.¹⁰⁴ This policy offends many peoples' sense of compassion and mercy. A hard-working person with a family to support, who will lose his job because of a jail sentence, seems less culpable than one who has no family or community ties, drifts in and out of jobs and burdens society for his support. While some of these factors may be "manipulable" by offenders who would marry, take a job, or become a parent as a ploy,¹⁰⁵ it seems unwise to abandon centuries of almost universally accepted values because of this possibility. Surely judges are aware of the potential for abuse, and factor it into their sentencing decisions.

Although rehabilitation is no longer a primary goal for the criminal process generally, factors predicting the potential for rehabilitation continue to be proper sentencing considerations. A sentencing philosophy which treats all crimes alike, without regard to differences between those who commit them, "is dehumanizing and has grave and dehumanizing implications for all of society."¹⁰⁶ It is important for reformers to look beyond the theoretical differences in philosophies and retain basic humanitarian concerns.

Florida reformers appear to have done this. By not prescribing a list of factors which must be referred to for justifying departure, the Commission seems to have endorsed use of the defendant's personal characteristics in sentencing. Apparently, the fear of allowing too much discretion to the judges was outweighed by the realization that more than a mathematical formula is needed when dealing with individuals' lives.

To limit discretion, albeit with use of some provisions already

102. von Hirsch, *supra* note 8, at 182. The term "modified" indicates the fact that the just desert philosophy is blended with an incapacitative one as well. *Id.*

103. *Id.* at 206, citing a letter from Andrew von Hirsch to Dale G. Parent (Oct. 8, 1979).

104. GUIDELINES, HAMLINE, *supra* note 99, at 411.

105. "Manipulability" is the reason the Minnesota Guidelines Commission excluded employment as a sentencing consideration. *Id.* at 412, Comment II. D. 101.

106. D. POINTER, C. ROSENSTEIN, and M. KRAVITZ, PERSPECTIVES ON DETERMINE SENTENCING: A SELECTED BIBLIOGRAPHY, 3 (1982) (summarizing B. Alper and J. Weis, MANDATORY SENTENCE - RECIPE FOR RETRIBUTION, V 41, N. 4 FED. PROBATION, 15-20 (December 1977)).

mandated by the Constitution, the Commission provided direction by noting that "[s]entencing should be neutral with respect to race, gender, and social and economic status."¹⁰⁷ These factors are precisely the kinds of considerations which unfairly bias judges and result in unwarranted disparity in sentencing.

C. The Standard for Departure

1. *A Last Minute Change*

The July 1983 draft of the Florida Sentencing Guidelines provided that "substantial and compelling"¹⁰⁸ circumstances were needed to justify departures from the guidelines. The "substantial and compelling" standard was derived from the Minnesota Sentencing Guidelines.¹⁰⁹ In Minnesota, where the "substantial and compelling" test controls departures, it proved to command a fairly strict adherence to the presumptive sentences of the guidelines.¹¹⁰ However, the final guidelines which were adopted by the Florida Supreme Court in September, 1983, provide that "clear and convincing reasons"¹¹¹ are necessary for the trial court to deviate from the presumptive guideline range.¹¹²

The reasons for the Commission's decision to change the standard for departure are not explicit. The switch occurred on August 26, 1983, at the Commission's final meeting, following the receipt of suggestions and comments spurred by the proposed rule's publication in the Florida Bar News earlier that summer. After the Commission considered these suggestions and comments several changes were made, one of which was the test for departure. The reason for favoring the "clear and convincing" standard may be that it does appear in several other areas of Florida law,¹¹³ whereas the "substantial and compelling" test is only

107. FLA. R. CRIM. P. 3.701(b)(1).

108. MANUAL, *supra* note 70, at 3, Principles 6 and 10, comment 11.

109. GUIDELINES, HAMLINE, *supra* note 99, at 395.

110. Note, *Minnesota Supreme Court Cases*, 5 HAMLINE L. REV. 319, 332 (1982). "[T]he Minnesota Supreme Court has consistently upheld the basic tenets of the Sentencing Guidelines and has demonstrated that it will require the trial judge to subordinate their own view about the sentencing process, and act according to the stipulations of the Guidelines." *Id.* at 332.

111. FLA. R. CRIM. P. 3.701(b)(6) and (d)(11).

112. *Id.*

113. See *infra* notes 147-56 for the areas of Florida law utilizing the "clear and convincing" test.

used in the context of constitutional challenges based on fundamental rights. In these cases, the state must prove it has a "substantial and compelling" interest to justify the challenged classification, and that the means used to achieve the legislative end are "necessarily and precisely drawn."¹¹⁴

The Florida Supreme Court has characterized that test as "almost always fatal in its application, imposing a heavy burden of justification upon the state. . . ."¹¹⁵ Therefore, it appears that the greater familiarity with the "clear and convincing" standard alone may not entirely account for the Commission's decision to adopt it. The real reason for the change may have been pressure from prosecutors who felt that judges would need a more lenient standard to depart from the guidelines. State attorneys have criticized the guidelines' sentences for being too short. Broward County State Attorney Michael Satz is typical of the prosecutors who say that the new sentences are too short, and that criminals will not be getting what they truly deserve.¹¹⁶ In response to that criticism, however, Senator Crawford, drafter of the original Senate Bill, counters that the old sentencing system was a "fraud" against the media and the public.¹¹⁷ "The judges' sentences are often ignored" and have "become meaningless."¹¹⁸ The fraud Crawford refers to existed because the actual term served as determined by the Probation and Parole Commission, which often resulted in sentences being reduced by over one half.¹¹⁹ Because the guidelines effectively eliminate the early release of prisoners by parole,¹²⁰ the sentences are much shorter than the ones Florida has imposed in the past. Nevertheless, state attorneys from at least ten Florida circuits oppose the guidelines because "the sentences listed are entirely too lenient, and. . . the ranges allowed for deviation are entirely too small."¹²¹ Other criticisms of the

114. In *Re Estate of Greenberg*, 390 So. 2d 40, 42 (Fla.), *dismissed* 67 L.Ed.2d 610, 101 S. Ct. 1475 (1980).

115. *Id.* at 43.

116. Pellegrino, *New Sentencing Plan Finds Few Allies*, Fort Lauderdale News/Sun Sentinel, June 12, 1983, at A 12 col. 5 [hereinafter cited as *Allies*].

117. Hillstom, *New 'Truth in Sentencing' Rules begin Oct. 1*, Miami Herald, Sept. 11, 1983, at D 1, col. 2, 3. The term used in the title here is not to be confused with "real offense sentencing" discussed *infra*, text accompanying notes 163-171.

118. *Id.* at D 2, col. 1.

119. See Chart at *Allies*, *supra* note 116, at A 12.

120. FLA. STAT. § 921.001(8) (1983).

121. M. Satz, R. Stone, E. Whitworth, K. Zuelch, J. Appleman, R. Eagan, J. Gardner, D. Modesitt and C. Golden, Petitioners Brief in Opposition, Rules of Crimi-

test attack its potential for creating an unconstitutional assumption by the court "through its rule making power of legislative authority to enact substantive law."¹²²

With such vocal opposition to the "substantial and compelling" requirement, it is not surprising that the Commission struck it from the guidelines and replaced it with the less stringent "clear and convincing" standard. It is questionable, however, how much of a concession this actually is. The new test may act as a two-edged sword, because defense attorneys can also request downward departures from the guidelines for defendants, judged by the same test. Whatever the reasons for the change, the fact remains that "clear and convincing," not "substantial and compelling" reasons are necessary.

The change may be merely rhetorical and not lower the standard for departure whatsoever. In Minnesota, where the language for departure remains "substantial and compelling," it has arguably been equated with "clear and convincing." In *State v. Olson*,¹²³ the Minnesota Supreme Court stated: "[s]ubstantial and compelling evidence at the Sentencing Hearing with respect to the overall excellent background and character of the defendant had been received, and [was] 'clear and convincing.'"¹²⁴ The two tests stand side by side in this case, apparently without conflict. If this language does not make the tests synonymous, it at least raises considerable doubt as to which is more stringent.

The terms of the tests themselves seem to be somewhat correlative. A "substantial" reason is likely to be a "clear" reason, and vice versa, and a "compelling" reason is likely to be a "convincing" reason. However, the terms do not seem to be identical: it is possible to have a convincing reason which is not compelling. In that regard, perhaps the "substantial and compelling" test is more rigid. Whatever the relationship of the tests, a review of the cases in Minnesota may provide a sense of the kinds of issues that may be raised on appeal in Florida. If "substantial and compelling" is indeed a more rigid test, the reasons which have withstood appellate review there will certainly pass muster under Florida's test.

nal Procedure (Rule 3.701) Sentencing Guidelines, Case No. 63,962, at 10 (1983).

122. J. Reno, Comments Regarding Porposed Sentence Guidelines, In re Rules of Criminal Procedure, Proposed Rule 3.710, [sic] Regarding Sentencing Guidelines, Case No. 63,962 at 2 (1983).

123. 325 N.W.2d 13 (Minn. 1982).

124. *Id.* at 15.

2. Minnesota Cases

The first Minnesota Supreme Court case interpreting that state's guidelines manifested a strong support of them. In *State v. Garcia*,¹²⁵ the parties had negotiated a plea in an attempt to shorten the guideline-prescribed sentence. This plea was rejected by the trial court, and the Supreme Court upheld that decision. The Court reproved, "[o]nly the court, acting in accordance with the Guidelines, and not the parties, has the authority to determine the appropriate sentence."¹²⁶ Under the Florida Sentencing Guidelines, plea bargaining will still exist, but it will take on a new character. Much of the negotiation will be over the charge at conviction itself, and the points assigned for variables such as "victim injury" rather than on the length of the sentence.

The Minnesota cases that followed *Garcia* continued to scrutinize the trial courts' decisions very closely, and to insist upon a careful reading of and compliance with the guidelines. Among the factors which were rejected by the Supreme Court of Minnesota as *not* being "substantial and compelling" so as to warrant an upward departure from the guidelines were: the trial court's belief that the defendant was dangerous and that he had taken drugs during the offense,¹²⁷ the trial court's speculation that the morphine stolen in an aggravated robbery of a pharmacy would be distributed in the future,¹²⁸ the fact that the defendant was driving without a license during the offense, his "lack of candor," the inadequacy of facilities available in the community to rehabilitate him, and his alleged continued prostitution.¹²⁹ Generally, the court flatly refused to uphold departures based on factors which were already figured into the offense's guideline prescribed sentence, such as criminal history record whether good or bad.¹³⁰ In a few cases, reversal of the trial court's departure rested on the simple grounds that no valid arguments for departure were given.¹³¹

Factors which were found to warrant an aggravated departure

125. 302 N.W.2d 643 (Minn. 1981).

126. *Id.* at 647.

127. *State v. Magnan*, 328 N.W.2d 147, 150 (Minn. 1983).

128. *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981).

129. *State v. Barnes*, 313 N.W.2d 1, 2 (Minn. 1981).

130. *Magnan*, 328 N.W.2d at 149 (an upward departure), and *State v. Cizl*, 304 N.W.2d 632, 634 (Minn. 1981) (a downward departure).

131. *State v. Nelson*, 326 N.W.2d 917 (Minn. 1982), *State v. Johnson* 314 N.W.2d 229 (Minn. 1982); *State v. Leibfried*, 309 N.W.2d 36 (Minn. 1981); and *State v. Bellanger*, 304 N.W.2d 282 (Minn. 1981).

were generally those which are specifically listed in the Minnesota guidelines.¹³² For instance, "victim vulnerability,"¹³³ due to infancy or old age, was frequently upheld as a reason for an upward departure from the guidelines. "[P]articular cruelty" to the victim, that is, cruelty "of a kind not usually associated with commission of the offense in question,"¹³⁴ was also cited often as an appropriate aggravating factor.¹³⁵ Other proper reasons for an upward deviation include: infliction of an injury,¹³⁶ intruding upon a victim's zone of privacy by assailing the victim in his/her own home,¹³⁷ and neglecting the medical needs of the victim after the infliction of injury.¹³⁸

In addition to deciding whether a departure was warranted, the court also ruled as to whether departures were excessive. A basic principle was set down in *State v. Evans*.¹³⁹ There the court ruled that, "generally, in a case in which an upper departure in sentence length is justified, the upper limit will be double the presumptive sentence length."¹⁴⁰ This tenet sets only the upper limit, however, and was not intended to be the rule for all departures, nor is it an iron-clad rule that sentences cannot exceed the doubled limitation. "[T]here may be rare cases in which the facts are so unusually compelling that an even greater degree of departure will be justified."¹⁴¹

132. See *supra* notes 90-94, and accompanying text.

133. *State v. Givens*, 332 N.W.2d 187 (Minn. 1983); *State v. Jones*, 328 N.W.2d 736 (Minn. 1983); *State v. Norton*, 328 N.W.2d 142 (Minn. 1983); *State v. Van Gorden*, 326 N.W.2d 633 (Minn. 1982); *State v. Partlow*, 321 N.W.2d 886 (Minn. 1982); *State v. Stumm*, 312 N.W.2d 248 (Minn. 1981).

134. *Schantzen*, 308 N.W.2d at 487.

135. *Givens*, 332 N.W.2d at 187; *Jones* 328 N.W.2d at 736; *Norton* 328 N.W.2d at 142; *Van Gorden*, 326 N.W.2d at 633; *Partlow*, 321 N.W.2d at 886; *State v. Martinez*, 319 N.W.2d 699 (Minn. 1982); *Stumm*, 312 N.W.2d at 248; *State v. Evans*, 311 N.W.2d 481 (Minn. 1981); *State v. Fairbanks*, 308 N.W.2d 805 (Minn. 1981).

136. *Van Gorden*, 326 N.W.2d at 634.

137. *Id.* at 635; *Jones* 328 N.W.2d at 738.

138. *Stumm*, 312 N.W.2d at 249.

139. 311 N.W.2d at 481.

140. *Id.* at 483.

141. *Id.* In *Stumm*, 312 N.W.2d at 248, and *Van Gorden*, 326 N.W.2d at 633, the court upheld sentences exceeding the doubled presumptive sentences. The *Stumm* court held that the "absolute vulnerability of the helpless victim," who was a two year old child, justified an extreme departure, *Stumm*, 312 N.W.2d at 249. In *Van Gorden*, the combination of the 66 year old victim's age, the aggravated nature of the misconduct, permanent injury to the eyes resulting in vision loss, three distinct sexual penetrations invading the privacy zone of the victim's home, and dragging the victim outside her home, thereby increasing her fright, warranted the departure, *Van Gorden*, 326

A case which presented a blatant disregard of the guidelines by the sentencing judge was *State v. Bellanger*.¹⁴² The Minnesota Supreme Court quoted the trial court as stating, "there is a great deal too much made of regularity and conformity in sentencing."¹⁴³ The supreme court flatly reversed the upward departure, admonishing, "[g]eneral disagreement with the Guidelines or the legislative policy on which the Guidelines are based does not justify departure."¹⁴⁴

This survey of the Minnesota cases concerning the guidelines demonstrates the effect of the "substantial and compelling" standard. Adherence to the presumptive sentence is the rule, and departure clearly the exception. How close to this result the Florida cases will be is a matter of speculation at this point, because of inherent differences between the two sets of guidelines, the standard for departures, and the two states' laws in general. However, because of the great similarities in the two Sentencing Guidelines Commissions' intents and goals, and because of the absence of case law directly on point in Florida, these cases may provide some direction for the courts here.

3. "Clear and Convincing" in Florida

The "clear and convincing" standard has been used in Florida in a variety of legal settings. It is the proper standard of proof for the establishment of entitlement to a trust,¹⁴⁵ the introduction of hypnotically refreshed testimony,¹⁴⁶ civil commitment,¹⁴⁷ disbarment,¹⁴⁸ actual malice in defamation cases,¹⁴⁹ permanent commitment of an adopted child to the new parents,¹⁵⁰ establishing that *Miranda* warnings were

N.W.2d at 634, 635.

142. 304 N.W.2d 282 (1981).

143. *Id.* at 283.

144. *Id.*

145. *Hiestand v. Geier*, 396 So. 2d 744, 745 (Fla. 3d Dist. Ct. App.), *rev. denied*, 407 So. 2d 1103 (1981).

146. *Brown v. State*, 426 So. 2d 76, 91 (Fla. 1st Dist. Ct. App. 1983).

147. *In Re Preer Beverly*, 342 So. 2d 481, 488 (Fla. 1977); *Gorchov v. State*, 354 So. 2d 116, 117 (Fla. 3d Dist. Ct. App. 1978).

148. *The Florida Bar v. Rayman*, 238 So. 2d 594, 598 (Fla. 1970); *Abstract and Title Corp. of Florida v. Cochran*, 414 So. 2d 284, 285 (Fla. 4th Dist. Ct. App. 1982).

149. *Lampkin-Asam v. Miami Daily News, Inc.* 408 So. 2d 666, 669 (Fla. 3d Dist. Ct. App. 1982), *reh. denied*, 103 S. Ct. 838, *dismissed* 74 L. Ed. 2d 44, 103 S. Ct. 29. *Gibson v. Maloney*, 263 So. 2d 632, 637 (Fla. 1st Dist. Ct. App. 1972), *cert. denied*, 410 U.S. 984.

150. *In Re the Adoption of J.G.R.*, 432 So. 2d 735, 735 (Fla. 4th Dist. Ct. App.

given,¹⁵¹ the voluntariness of a confession to criminal charges,¹⁵² the reformation of a contract,¹⁵³ and the impeachment of service of process.¹⁵⁴ A thread of similarity runs through all of these situations. There is no perceived need for the criminal standard of "beyond a reasonable doubt," yet each controversy seems to demand more than a mere preponderance. This need stems from either the seriousness or the finality of the disputed matter's impending judgment. Prior to sentencing proceedings, a criminal defendant's guilt will have been proved "beyond a reasonable doubt." The sentence imposed under Florida's sentencing guidelines has been approved through the appropriate channels. The "clear and convincing" standard only applies to decisions to deviate from the prescribed sentence. The imposition of a criminal sentence being quite a serious matter, however, a standard more strict than "a preponderance" was deemed appropriate.

It may seem surprising that, even though applied in a number of areas, the term "clear and convincing" had not been satisfactorily defined by Florida courts until recently.¹⁵⁵ In *State v. Graham*,¹⁵⁶ the problem of defining the standard was described as follows:

Wigmore went to the heart of the matter: 'The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief.' We communicate with words rather than numbers in the legal profession, and this forces us to verbalize standards for the subjective feeling of probability engendered by evidence. Broadly, we say that the measure of persuasion in criminal cases is proof beyond a reasonable doubt, while civil cases require the lesser measure of proof by a preponderance of the evidence. Wigmore, however, recognizes that a 'stricter standard,' in some such phrase as 'clear and convincing proof' is commonly used to measure the necessary persuasion in certain matters.¹⁵⁷

In April of 1983, the Fourth District Court of Appeal of Florida

1983); In the Interest of T.C., a child, 417 So. 2d 775, 776 (Fla. 3d Dist. Ct. App. 1982).

151. *State v. Graham*, 240 So. 2d 486, 490 (Fla. 2d Dist. Ct. App. 1970).

152. *Id.*

153. *Allstate Insurance Co. v. Vanater*, 297 So. 2d 293, 298 (Fla. 1974).

154. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th Dist. Ct. App. 1983).

155. *Id.* at 799.

156. *Graham*, 240 So. 2d at 486.

157. *Id.* at 490.

went to great lengths to define the standard in *Slomowitz v. Walker*.¹⁵⁸

[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be directly remembered; the testimony must be precise and explicit and the witness must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.¹⁵⁹

This definition is presumably as good as any, given the nature of the concept. What is important to realize is that "clear and convincing" is a phrase which is normally used to determine the quantum of evidence or proof necessary to establish the truth of a disputed matter for the finder of fact. In the sentencing guidelines, however, "clear and convincing" is a descriptive phrase modifying the rationale accompanying a departure from the prescribed sentence. It is not the quantum of evidence necessary to prove that the reasons exist. Therefore, the meaning of the term becomes even more elusive. Hopefully, any reason a judge would have for sentencing a convicted felon to one term rather than another would be a valid one and therefore "clear." And presumably, any reason for imposing a sentence outside the guidelines would be "convincing" to the judge that it is a valid reason to depart. The questions that remain to be answered are how the interpretation of the "clear and convincing" standard will affect departures from the guidelines, and the direction that the new body of case law will take.

D. The End of "Real Offense Sentencing"¹⁶⁰

"Reasons for deviating from the guidelines shall not include factors relating to prior arrests without conviction. Reasons for deviating from the guidelines shall not include factors relating to the instant offenses for which convictions have not been obtained."¹⁶¹ "This state-

158. *Slomowitz*, 429 So. 2d 797.

159. *Id.* at 800.

160. This term was used in NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT (Approved Draft 1978), located in 10 UNIFORM LAWS ANN., (master ed. West 1974) (Supp. 1980) [hereinafter cited as MODEL ACT].

161. FLA. R. CRIM. P. 3.701(d)(11). The Sentencing Guidelines Commission presented recommendations for changes to the Florida Supreme Court which included

ment in the Florida's guidelines represents an attempt by the Commission to end the practice of "real offense sentencing,"¹⁶² sanctioned by the Model Sentencing and Corrections Act. Real offense sentencing requires the court to ignore the charge at conviction and to base the sanction on the defendant's "actual offense behavior."¹⁶³ Criticisms of the practice in general and the Model Act's advocacy of it "range from the constitutional to the principled to the practical."¹⁶⁴

The primary objection, however, is that real offense sentencing simply does not seem fair.¹⁶⁵ A defendant should be sentenced for the charge at conviction, and not for prior dismissed charges or acquittals. Moreover, where plea bargaining is utilized in fixing the offense, defendants must be sentenced according to their negotiated pleas. In return for the guilty plea and the waiver of the right to a jury trial, the prosecutor promises immunity from the imposition of the more serious charge and its sentence. The judge can not ethically consider his own conclusions as to the "real offense" when sentencing.¹⁶⁶ Despite the objection that real offense sentencing is not equitable, there is evidence that this injustice arises all too frequently. The practice has been described as "antithetical to our basic notions of individual worth and fair play."¹⁶⁷ The real concern is that "[m]ost courts now operate on a real offense system; they simply don't admit to it."¹⁶⁸

The provision in the Florida Sentencing Guidelines should put an end to this unfair practice. The judge is now forced to articulate and record the reasons for departure so that reasonable review of the case is possible. This ensures that the offense at conviction is the one by which defendants are sentenced, and promotes certainty in sentencing.

this new language. The court approved the changes and commented as to this revision that it was "revamped to replace the cumbersome language in the [original] rule." 9 FLA. L.W. 169 (May 11, 1984) (No. 19).

162. See *supra*, note 160.

163. M. Tonry, *Real Offense Sentencing: The Model Sentencing and Corrections Act*, 72 J. CRIM L. CRIMINOLOGY 1550, 1550 (1981).

164. *Id.* at 1556.

165. *Id.* at 1568. Tonry suggests that the practice of "real offense sentencing" is "institutionalized deceit." *Id.*

166. *Id.* at 1568-71.

167. *Id.* at 1564. "Real offense sentencing undermines the importance of the substantive criminal law, nullifies the law of evidence, and is irreconcilable with the notion that punishment can be imposed only in respect to offenses admitted or proven."

168. *Id.* at 1586.

III. Constitutionality

It should be noted that Minnesota's guidelines have withstood all constitutional attacks.¹⁶⁹ Because of the similarities between Minnesota's and Florida's guidelines, the Minnesota decisions may serve as persuasive authority in the initial challenges in Florida. Possible attacks in Florida may rest on various grounds, including the prohibition of cruel and unusual punishment, due process vagueness, equal protection, or separation of powers. Though it is impossible to foresee the precise circumstances of a constitutional attack, relevant case law will be examined in order to predict the outcome of such a challenge.

A. Cruel and Unusual Punishment

In a challenge based on the prohibition of cruel and unusual punishment under the state¹⁷⁰ and federal¹⁷¹ constitutions, the guidelines would be sustained, as will be illustrated. First, it is essential to note that the guidelines do not control capital offenses;¹⁷² therefore, the constitutionality of the death penalty, as addressed in *Gregg v. Georgia*,¹⁷³ will not be an issue. This is evidenced in *Rummel v. Estelle*,¹⁷⁴ where the petitioner received a mandatory life sentence pursuant to a Texas statute requiring such a penalty for all third time felony convictions. All three convictions were minor property offenses with an aggregate value of approximately \$230. Despite the penalty's apparent harshness, the statute was upheld. The United States Supreme Court noted that

[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of

169. *State v. Givens*, 332 N.W.2d 187 (Minn. 1983); *State v. Olson*, 325 N.W.2d 13 (Minn. 1982); *State v. Fields*, 311 N.W.2d 486 (Minn. 1981).

170. FLA. CONST. art. I, § 17 provides: "[e]xcessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden."

171. U.S. CONST. amend. VIII provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

172. FLA. STAT. § 921.144 (1982) provides for sentencing proceedings for capital felonies "to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082." This procedure remains unaffected by the guidelines.

173. 428 U.S. 238 (1976).

174. 445 U.S. 263 (1980).

limited assistance in deciding the Constitutionality of the punishment meted out to Rummel.

Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare. . . .¹⁷⁵

Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.¹⁷⁶

Gregg also adds weight to the high degree of deference the Court affords state legislatures in determining sentences. The Florida Supreme Court, in *Hamilton v. State*,¹⁷⁷ relied in part on *Gregg* in upholding a sentence imposed for sale and possession of cannabis mandated by section 893.13 of the Florida Statutes.

[I]n assessing a punishment selected by a democratically elected legislature against the Constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhuman or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the Constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.¹⁷⁸

In applying this principle to an attack on a sentence imposed pursuant to the Florida guidelines, it is apparent that as long as the actual sentence received falls within the statutory mandate, it will be upheld. Indeed, the guidelines are designed to avoid precisely the disproportionate sentences that the cruel and unusual clause proscribes. In *Banks v. State*,¹⁷⁹ the Florida Supreme Court held that a life sentence with a

175. *Id.* at 272.

176. *Id.* at 285.

177. 366 So. 2d 8 (Fla. 1979).

178. *Id.* at 11 (citing *Gregg*, 428 U.S. at 174-75).

179. 342 So. 2d 469 (Fla. 1977) (affirming a conviction for involuntary sexual

minimum of twenty-five years imprisonment prior to parole eligibility did not amount to cruel and unusual punishment. It stated that it had "no jurisdiction to interfere"¹⁸⁰ because the sentence was within the limits set by the legislature.¹⁸¹

The guidelines' purpose is to limit judicial discretion by "establish[ing] a uniform set of standards to guide the sentencing judge,"¹⁸² thus minimizing unwarranted disparity in sentences. As long as the sentences are within the guidelines, a cruel and unusual punishment challenge will undoubtedly fail. However, sentences which are harsher than the guideline's presumptive range because of "clear and convincing"¹⁸³ reasons, may pose a separate issue of whether the degree of departure from the guidelines is warranted by the circumstances of the crime.¹⁸⁴ If not, the constitutional question of whether the deviation violates the cruel and unusual punishment clause may be presented, with less clear-cut results than where the sentence is within the guidelines. The outcomes of challenges presenting these questions will depend on individualized analyses of the facts of each case. Because it is conceivable that a court of appeals could find an abuse of discretion in the judge's sentence, an extreme departure from the guidelines could constitute cruel and unusual punishment. However, this finding would only affect that particular sentence, and not the constitutionality of the guidelines as a whole.

The weakness of a cruel and unusual punishment attack is further evidenced by the guidelines' subordination to mandatory sentences. The guidelines provide that "[f]or those offenses having a mandatory penalty, a scoresheet should be completed and the guideline sentence calculated. If the recommended sentence is less than the mandatory penalty, the mandatory sentence takes precedence. If the guideline sentence exceeds the mandatory sentence, the guideline sentence should be imposed."¹⁸⁵

Mandatory minimum sentences were upheld in *McArthur v.*

battery).

180. *Id.* at 470.

181. FLA. STAT. § 775.082(1).

182. FLA. R. CRIM. P. 3.701(b).

183. FLA. R. CRIM. P. 3.701(b)(6) and (d)(11).

184. See *supra* nn.139-41 and accompanying text for a discussion of the permissible extent of departure from guideline sentences in Minnesota. The standard for departure in Florida is discussed *supra*, notes 145-59 and accompanying text.

185. FLA. R. CRIM. P. 3.701(d)(9).

*State*¹⁸⁶ and *State v. Benitez*.¹⁸⁷ In *McArthur*, the petitioner argued that the statute, which mandated a twenty-five year sentence before parole eligibility for first-degree murder constituted cruel and unusual punishment. He asserted that "it operate[d] without regard to the circumstances of individual defendants or the crimes for which the defendants have been convicted."¹⁸⁸ Regarding the federal Constitution, the Florida Supreme Court distinguished this case from ones involving the death sentence,¹⁸⁹ relying on *Woodson v. North Carolina*.¹⁹⁰ "the penalty of death is qualitatively different from a sentence of imprisonment, however long."¹⁹¹ In *Woodson*, the court noted that "the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative."¹⁹² Thus, the penalty passed muster under the federal Constitution.

As to the Florida Constitution, the *McArthur* court relied on *O'Donnell v. State*¹⁹³ which upheld a thirty year mandatory sentence for kidnapping.¹⁹⁴ That case reiterated the principle espoused above; that any sentence within the statutory scheme's limits was not violative of the Florida Constitution.¹⁹⁵ In *State v. Benitez*,¹⁹⁶ the Florida Supreme Court again rejected the argument that the elimination of judicial discretion in mandatory minimums violates the cruel and unusual clauses.¹⁹⁷ Relying on *McArthur*, the court upheld the mandatory sentences for drug trafficking.¹⁹⁸

Since the mandatory minimum sentences are constitutional, the guidelines' sentences would only be suspect in instances where they exceed the mandatory minimum and are imposed pursuant to the guidelines.¹⁹⁹ However, the guidelines allow for more individualized sentencing than the mandatory minimum sentences. For instance, a

186. 351 So. 2d 972 (Fla. 1977).

187. 395 So. 2d 514 (Fla. 1981).

188. *McArthur*, 351 So. 2d 972, 975.

189. *Id.*

190. 428 U.S. 280 (1976).

191. *Id.* at 305 (as cited in *McArthur*, 351 So. 2d at 975).

192. *Id.* (Emphasis in original).

193. 326 So. 2d 4 (Fla. 1975).

194. FLA. STAT. § 775.082(4)(a) (1973).

195. *McArthur*, 351 So. 2d at 975-76.

196. 395 So. 2d 514 (Fla. 1981).

197. *Id.* at 518.

198. *Id.*

199. FLA. R. CRIM. P. 3.701(d)(9).

defendant's record, victim injury, and the defendant's legal status at time of conviction are all factored into the guideline sentence. Thus, the guidelines are more proportionate to the seriousness of the crime and therefore less likely than mandatory sentencing schemes to constitute cruel and unusual punishment. Furthermore, guideline sentences exceeding statutory maximums may not be imposed. In the case of such a conflict the statutory maximum sentence takes precedence. This further illustrates the intent of the legislature to generally reduce severity of sentences thus contradicting any cruel and unusual punishment argument.

B. Due Process Considerations

Perhaps the most likely due process argument would be a vagueness challenge. In *Benitez*, petitioners argued that the definition of a defendant who is eligible for lenient treatment under Florida Statutes section 893.135 was impermissibly vague and thus violated the due process clauses of the Florida²⁰⁰ and federal²⁰¹ Constitutions.²⁰² In statutes proscribing certain activity as criminal, the test for vagueness is "language that is definite enough to provide notice of what conduct will constitute a violation."²⁰³ However, the statute challenged in *Benitez* and the guidelines do not prohibit behavior as criminal; rather, they determine penalties for existing substantive crimes. In *Benitez*, the court stated that, "[b]eing a description of *post-conviction*. . . form of plea bargaining rather than a definition of the crime itself, the phrase 'substantial assistance' can tolerate subjectivity to an extent which normally would be impermissible for penal statutes."²⁰⁴ The court held that the contested phrase was "susceptible of common understanding in the context of the whole statute,"²⁰⁵ and therefore did not violate due process.²⁰⁶

200. FLA. CONST. art. I § 9.

201. U.S. CONST. amend. V and XIV.

202. 395 So. 2d at 518.

203. *State v. Ashcraft*, 378 So. 2d 284, 285 (Fla. 1979). The text continues: "[i]f the language is definite enough, when measured by common understanding and practice, to apprise ordinary persons [of common intelligence] of what conduct is proscribed, the statute is not vague." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 448 (1927); *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

204. *Benitez*, 395 So. 2d at 518 (emphasis in original).

205. *Id.* at 519.

206. *Id.*

It is difficult to predict which, if any, language in the guidelines may be subject to a vagueness attack. In a Minnesota case, *State v. Givens*,²⁰⁷ the defendant attacked the constitutionality of that state's standards for departure from the guidelines. The Minnesota Supreme Court upheld the guidelines concluding that the vagueness challenge was "misplaced in this context."²⁰⁸ Relying on reasoning similar to that enunciated in the cruel and unusual punishment arguments, the court distinguished the application of a vagueness challenge in death penalty cases from sentences controlled by the guidelines. Relying on *Godfrey v. Georgia*²⁰⁹ and *Gregg*, the court noted that crimes punishable by death must be defined in a way that "obviates standardless sentencing discretion."²¹⁰ Since Givens was not sentenced to death or subjected to cruel and unusual punishment, the court refused to extend the doctrine to his situation: "[t]he application of vagueness argument to more routine sentencing decisions - those not including the death sentence, is not contemplated by the *Gregg* and *Godfrey* decisions."²¹¹ Before concluding that the vagueness argument was "misplaced,"²¹² however, the court expressed its support for the guidelines, apparently rejecting the defendant's challenge on the merits despite its inappropriateness.

Three points must be made before analyzing the constitutional merit of defendant's claim: (1) the guidelines not only list aggravating factors - such as race, sex, employment - which may not be used as a basis for a sentencing departure; (2) the trial court applied only specified aggravating factors, and (3) this court is in the process of fleshing out the guidelines in an ongoing series of judicial decisions. Counsel for defendant and the state acknowledged at oral argument that the guidelines represent a salutary step forward in controlling sentencing discretion, with an ultimate objective of achieving greater uniformity in sentencing statewide, consistent with fitting punishment to the particular nature of the crime committed.²¹³

This defense of the guidelines seems to anticipate the possible ex-

207. 332 N.W.2d 187 (Minn. 1983).

208. *Id.* at 190.

209. 446 U.S. 420 (1980), *cert. denied*, 456 U.S. 919, *reh'g denied* 456 U.S. 1001 (1982).

210. *Givens*, 332 N.W.2d at 190, (citing *Godfrey*, 446 U.S. at 428).

211. *Givens*, 332 N.W.2d at 190.

212. *Id.*

213. *Id.* at 189.

pansion of the *Godfrey* and *Gregg* decisions. It anticipates an approval of the degree of definiteness the guidelines possess in case of the need for such justification in the future. The Florida guidelines may not be able to meet this type of challenge so ably. They specify no aggravating or mitigating factors for use in departing from the guidelines. However, they do prohibit the consideration of race, gender, social and economic status,²¹⁴ or "factors relating to prior arrests without conviction" or "factors relating to the instant offense for which convictions have not been obtained."²¹⁵ General goals in the Statement of Purpose will also provide guidance to the sentencing judge.²¹⁶ Whether these provisions will be sufficient to save the guidelines from a vagueness attack is uncertain, but seems probable. As the Minnesota Supreme Court noted in *Givens*, the guidelines represent a "salutory step forward in controlling judicial discretion,"²¹⁷ and at least assure more definiteness in sentencing than was guaranteed before the rules' inception. Thus, inasmuch as the broad discretion allowed in indeterminate sentencing practices of the past were never held unconstitutionally vague, it is doubtful that the Florida guidelines will fall to a vagueness challenge.

C. Equal Protection

Another potential ground for attack is the denial of equal protection of the law in violation of the fourteenth amendment of the United States Constitution and article I section 2 and section 9 of the Florida Constitution. Because of the high degree of discretion given a state legislature²¹⁸ in devising statutory categories, this challenge will place a heavy burden on the petitioner.²¹⁹

It is difficult to foresee the delineations of the challenged classification, but several possibilities exist. A broad classification could simply include all convicted felons subject to sentencing under the guidelines. A more narrow class might include all felons convicted and sentenced pursuant to one of the nine offense categories in the guidelines. Whatever the demarcation of the class the test of constitutionality will be whether there exists a "[r]ational basis for the classifica-

214. FLA. R. CRIM. P. 3.701(b)(1).

215. *Id.* at (d)(11). As discussed *supra* notes 160-68 and accompanying text, this provision should end the practice of "real offense sentencing". *Supra* note 160.

216. FLA. R. CRIM. P. 3.701(b).

217. *Givens*, 332 N.W.2d at 187.

218. *Hamilton v. State*, 366 So. 2d 8, 10 (Fla. 1979).

219. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1910).

tion. . . or whether this classification is arbitrary and, therefore, unconstitutional."²²⁰

In ordinary equal protection challenges where no suspect class or fundamental right is involved, there is no constitutional mandate that the law operate without any inequality. "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."²²¹ Therefore, it would not be enough to show that some offenders are treated somewhat differently than others who, though apparently similarly situated, somehow were not included in the class. Furthermore, "[w]hen the classification in such a law is called in question, if any set of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted, must be assumed."²²² Given this test, which is highly deferential to the legislature, a challenger should be skeptical of the possibility of success. Surely the state could conceive of some reasonable justification for the delineation of the challenged class. Basis for such justification could be found in the legislative history of the bill, or in the statistical data gathered by the Sentencing Commission. Unless the challenger can show that the guidelines classification "does not rest upon any reasonable basis, but is essentially arbitrary,"²²³ the challenge will fail.

In Minnesota, an equal protection challenge of the guidelines failed even when the defense attempted to bolster its chances of success by claiming that the guidelines, as applied, were racially discriminatory.²²⁴ The defense premised this claim on statistical data showing that blacks received disparate sentences for the same crimes as whites.²²⁵ If the finding of intentional racial discrimination had been made, the standard of review would have been elevated from mere rationality to strict scrutiny.²²⁶ The court rejected the contention that racial discrimination was the reason for defendant's sentence departing upwardly from the guideline range.

Disparity of sentencing based upon race has no place in our justice

220. *Hamilton*, 366 So. 2d 8, 10.

221. *Lindsley*, 220 U.S. at 78-79.

222. *Id.*

223. *Id.*

224. *Givens*, 332 N.W.2d at 191.

225. *Id.*

226. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

system. The guidelines specifically reject race as a sentencing factor in sentencing decisions. Whatever disparity exists, discrimination was not the fact [sic] in this case. The absence of bias by the jury is demonstrated by the verdict acquitting defendant of the first-degree murder and criminal sexual conduct charges. And more importantly with regard to sentencing bias, counsel for defense explicitly acknowledged that the trial court was in no way motivated by racial bias.²²⁷

The Florida guidelines also specifically mandate that “[s]entencing should be neutral with respect to race.”²²⁸ Therefore, unless it could be proved that a particular sentence was imposed solely as a result of racial discrimination, an attack like the one in *Givens* would also fail in Florida.

D. Separation of Powers

Another potential Constitutional argument rests on the Separation of Powers doctrine. Article II § 3 of the Florida Constitution sets forth the principles in the following language: “[t]he powers of the state government shall be divided into legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless provided herein.” Article V section 2 provides that “[t]he supreme court shall adopt rules for the practice and procedure in all courts. . . .” An attack might be formulated charging that the legislature, in passing section 921.001 of the Florida Statutes, which proposed the rule implementing the guidelines, encroached upon the rule-making authority of the supreme court. However, the supreme court’s adoption of the rules in September, 1983 renders this argument moot.

E. Double Jeopardy

Finally, a challenge based on double jeopardy grounds may be posed. The state is authorized to appeal from “[a] sentence imposed outside the guidelines.”²²⁹ This provision may be grounds for a broad attack on the constitutionality of this power in that it subjects the defendant twice to jeopardy of life or limb.

227. *Givens*, 332 N.W.2d at 191.

228. FLA. R. CRIM. P. 3.701(b)(1).

229. FLA. STAT. § 924.07 (1983).

However, this issue was already resolved in *United States v. DiFrancesco*.²³⁰ where the United States Supreme Court upheld the government's right to appeal a sentence. DiFrancesco was convicted in federal district court of racketeering offenses. He appealed his conviction to the Court of Appeals for the Second Circuit, and the government appealed the sentence received under a particular charge.²³¹ The court of appeals affirmed the defendant's convictions but dismissed the government's appeal to increase his sentence.²³² The court held that "to subject a defendant to the risk of substitution of a greater sentence, upon an appeal by the government is to place him a second time 'in jeopardy of life or limb.'"²³³ The United States Supreme Court, upon a grant of petition of certiorari, reversed, explaining that the "Double Jeopardy Clause is *not* a complete barrier to an appeal by the prosecution in a criminal case."²³⁴ Because the appeal did not pose the risk of a successive prosecution, but merely made possible a greater sentence, it did not offend double jeopardy principles.²³⁵ "The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be."²³⁶

In dicta relevant to the guidelines, the Court noted that "sentencing is one of the areas of the criminal justice system most in need of reform"²³⁷ The Court acknowledged that the "basic problem" in the criminal system is "the unbridled power of sentences to be arbitrary and discriminatory."²³⁸ The Court then concluded that "[a]ppellate review creates a check upon this unlimited power, and should lead to a greater degree of consistency in sentencing."²³⁹ This language implicitly lends support to the principles and purposes of the guidelines, and indicates approval of the type of reform the guidelines attempt to

230. 449 U.S. 117 (1980).

231. *U.S. v. DiFrancesco*, 604 F.2d 769 (1979), *cert. granted*, 444 U.S. 1070, *rev'd*, 449 U.S. 117 (1980).

232. *Id.* at 783.

233. *Id.*

234. *DiFrancesco*, 449 U.S. at 122 (emphasis in original).

235. *Id.*

236. *Id.* at 137.

237. *Id.* at 142. The Court cites M. FRANKEL, *CRIMINAL SENTENCES, LAW WITHOUT ORDER* (1973) and P. O'DONNELL, M. CHURGIN and D. CURTIS, *TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM* (1977).

238. M. FRANKEL, *supra* note 237, at 49. cited at *DiFrancesco*, 449 U.S. at 143.

239. *DiFrancesco*, 449 U.S. at 143.

implement.

The Minnesota Guidelines also allow the state to appeal from a sentence. In *State v. Cizl*,²⁴⁰ the defendant challenged the constitutionality of this power, and the court relied on *DiFrancesco* with virtually no discussion.²⁴¹ In Florida, a similar double jeopardy attack will likely be dismissed on the same grounds.

It is clear that the guidelines will be challenged in various areas of constitutionality; however, based on this survey of the case law, it may be concluded that no strong arguments exist. In any event, the perimeters of the attacks must be confined to precedent, thus it appears unlikely for a successful challenge to be posed.

IV. Conclusion

The guidelines have already caused great controversy in Florida's judicial and political forums. No one can predict the aggregate impact of their implementation with great accuracy. The consequences of abolishing early release through parole, the effects on plea negotiation, and changes the newly proclaimed philosophy of just-deserts will produce are issues which only time will clarify. The judiciary's implementation and the Commission's monitoring of the guidelines will determine the direction of sentencing for the future. The guidelines are not the panacea of the criminal justice system, but merely a modification which may provide the needed structure to accommodate future improvements.

Rebecca Jean Spitzmiller

240. 304 N.W.2d 632 (Minn. 1981).

241. *Id.*

Container Corporation of America v. Franchise Tax Board: Florida Imports the Unitary Tax

I. Introduction

In *Container Corporation of America v. Franchise Tax Board*,¹ the Supreme Court for the first time² approved the application of the unitary method of state taxation³ to the worldwide operations of a multinational business. The decision permits states to use a method of taxation different from that used by the federal government and most foreign governments.

Emboldened by the decision in *Container*, the Florida Legislature adopted a tax on multinationals similar to that approved by the Court.⁴ This comment presents a background for understanding the *Container* decision, an analysis of that decision, as well as Florida's legislative response, Florida businesses' negative reaction, and federal Executive action. The states have demonstrated a preference for the unitary method when imposing an income tax on multinational businesses. To understand this preference, this comment begins with an examination of state taxation of multijurisdictional businesses.

1. — U.S. —, 103 S. Ct. 2933 (1983).

2. In two cases argued together last term, the Court failed to reach the issue decided in *Container*. In both cases the Court held that the business operations of the domestic corporation and its foreign subsidiaries were not unitary; therefore, it was unnecessary to decide whether the unitary tax method could be applied to the worldwide operations of a multinational business. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307 (1982); *F.W. Woolworth Co. v. Taxation and Revenue Dep't*, 458 U.S. 354 (1982).

See also Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980), in which the Court held that dividend income received by a nondomiciliary corporation from its subsidiaries could be taxed by a state using the unitary method. *See generally* Comment, *State Taxation of Foreign-Source Income: Mobil Oil Corp. v. Commissioner of Taxes*, 66 CORNELL L. REV. 805 (1980).

3. The unitary method taxes multinationals based on the percentage of their worldwide income attributable to the in-state activities of the business. For a more complete discussion of the unitary tax, *see infra* notes 10-36 and accompanying text.

4. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848 (West) (effective Sept. 9, 1983).

II. State Taxation of Multijurisdictional Businesses

A. Development of the Unitary Tax

A domestic corporation whose operations are multistate or multinational may be subject to income tax in more than one jurisdiction. Because a state may not tax income earned outside its borders,⁵ the state requires corporations to allocate a portion of their total taxable income to that state. Three methods have evolved for allocating the income of a corporation to a particular state: (1) separate or arms-length accounting; (2) formula apportionment; and (3) specific allocation.

The arms-length method used by the federal government and most foreign governments allocates income on a geographic basis.⁶ The income-producing activities of a corporation in one jurisdiction are treated as separate and distinct from those outside the jurisdiction. Often, however, income earned by a corporation may be generated "by a series of multistate transactions beginning with manufacturing profit in one state and ending with sales profit in other States."⁷ The income-producing activities of a multijurisdictional corporation may be so interrelated (unitary) that it is a fiction to allocate income among jurisdictions based on artificial geographic boundaries. Indeed, proponents of formula apportionment contend that businesses use the arms-length method to hide income or shift it to jurisdictions where it will be subject to less tax or no tax at all.⁸ Income may be shifted to other coun-

5. See e.g., *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1983). See *infra* notes 37-42 and accompanying text.

6. P. HARTMAN, *FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION* 252 (1981). See also Keesling & Warren, *The Unitary Concept In the Allocation of Income*, 12 *HASTINGS L.J.* 42-3 (1960).

7. P. HARTMAN, *supra* note 6, at 522. In one case, for example, all the manufacturing of a multistate business was performed in Connecticut. However, the corporation allocated only three percent of its net income to Connecticut based on separate accounting. The Court, recognizing that the manufacturing process is responsible for a substantial portion of the income earned in other states, approved a one-factor (property) apportionment of income to Connecticut. Since 47% of the company's property was in Connecticut, 47% of its income was apportioned to the state. *Underwood Type-writer Co. v. Chamberlain*, 254 U.S. 113 (1920).

8. Cappetta, *State Tax Harmonization and the Multistate Tax Commission*, 38TH ANNUAL N.Y.U. INST. § 44.02[3] (1980). The Court acknowledged this contention, noting "that closely related corporations can engage in a transfer of values that is not fully reflected in their formal ledgers." *Container*, ___U.S. at ___, 103 S. Ct. at

tries as well as other states. "[O]ver one-third of revenues, operating profits and assets of the top 150 [domestic] companies are other than United States revenues, profits and assets."⁹

In order to assure a more accurate division of income, all states which impose a corporate income tax¹⁰ have adopted the formula apportionment method of taxation.¹¹ The formula method¹² attributes income to a particular state "based on the assumption that the total income of a business enterprise results from certain income-producing factors, such as property, payroll, [and] sales. . . ."¹³ The in-state value of each factor is first divided by the total value of that factor for the corporation. The average of the factors is then multiplied by the total corporate income to determine the income taxable by the state.¹⁴ For example, suppose a multinational business has sales of \$300, payroll of \$25, and property of \$100 in State A. The corresponding worldwide figures are \$1000, \$250, and \$500. The standard three-factor formula¹⁵ would be applied as below:

2953.

9. Cappetta, *supra* note 8, at § 44.06[1].

10. Washington, South Dakota, Wyoming, Texas and Nevada are the only states that do not impose a corporate income tax. *See* ST. TAX GUIDE, ALL STATES (2d. ed. CCH), Table of Rates, at 1031.

11. GOV'T ACCOUNTING OFFICE, REPORT BY THE COMPTROLLER GENERAL, KEY ISSUES AFFECTING STATE TAXATION OF MULTIJURISDICTIONAL CORPORATE INCOME NEED RESOLVING 5 (1982) (hereinafter cited as KEY ISSUES).

12. The formula method is described in P. HARTMAN, *supra* note 6, at 523.

13. *Id.* At the federal level, Section 482 of the Internal Revenue Code allows the Internal Revenue Service to intervene between the controlling and controlled interests of a taxpayer to assure proper allocation of income between such interests. "The standard to be applied in every case is that of an uncontrolled taxpayer dealing at arm's length with another uncontrolled taxpayer." Treas. Reg. § 1.482-1(b)(1) (1962). In addition, Section 994 of the Code provides rules for inter-company pricing of Domestic International Sales Corporation's (DISC). A DISC is a business which derives most of its gross receipts from exports. *See* I.R.C. § 992 (a)(1) (1983).

14. KEY ISSUES, *supra* note 11, at 3.

15. The standard three-factor formula is based on the UNI. DIV. OF INCOME FOR TAX PURPOSES ACT, 7A U.L.A. 91 (1978).

Primary support for formula apportionment comes from the Multistate Tax Commission, the administrative arm of the Multistate Tax Compact. Cappetta, *supra* note 8, at § 44.01[2].

The Court upheld a one-factor (sales) formula in *Moorman Mfg. Co. v. Blair*, 437 U.S. 267 (1978), and a one-factor (property) formula in *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

$$\frac{\frac{300}{1000} + \frac{25}{250} + \frac{100}{500}}{3} = \frac{.3 + .1 + .2}{3} = \frac{.6}{3} = .2 \text{ or } 20\%$$

Twenty percent of the combined net income of the unitary multinational business would be apportioned to State A and subject to its corporate income tax.

The standard three-factor formula is applied to mercantile or manufacturing enterprises because sales, payroll and property are the prime income-producing factors of such businesses. However, the standard formula may not be appropriate for industries such as banking, insurance, retail sales or transportation. A different mix of factors, such as payroll and receipts for banking, may provide a more accurate picture of a business' in-state activities.¹⁶ Florida imposes a franchise tax on banks and savings associations rather than the unitary tax.¹⁷ Insurance companies may use a one-factor formula based on direct premiums written.¹⁸ Transportation services companies may use a one-factor formula based on revenue miles.¹⁹

In contrast to the formula method, the arms-length method often results in a lower tax burden²⁰ on multinationals precisely because it ignores the interrelationship (and profitability) of the worldwide activities of a business. For example, Container paid \$72,000²¹ less in taxes using the arms-length method for the period 1963-65 than it would have had the three-factor formula method been used.

Specific allocation, the third method of allocating income, assigns certain types of non-operating income to a specific jurisdiction because the source of the income is closely related to a particular location. Included are such items as rent, capital gains and losses, and interest.²² Specific allocation is often used in conjunction with the apportionment method. First, non-business income is deducted from total corporate in-

16. Levinson, *Interstate Taxation and Apportionment of Bank Income*, 34 NAT'L TAX J. 447 (1981).

17. FLA. STAT. § 220.63 (1981). The franchise tax is a 5% tax on adjusted federal income, as defined in FLA. STAT. § 220.13 (1981).

18. FLA. STAT. § 214.72(1) (1981).

19. FLA. STAT. § 214.72(2) (1981).

20. However, the arms-length method does not always result in a lower tax burden. See *infra* text accompanying note 131.

21. *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, ___, 103 S. Ct. 2933, 2945 n.11-12 (1983).

22. See Keesling & Warren, *supra* note 6, at 42. See also P. HARTMAN, *supra* note 6, at 524.

come and allocated entirely to the state. The remaining corporate income is then multiplied by an apportionment formula. The state may then impose a tax on the income of the corporation which has been specifically allocated to the state and also on income apportioned to it by means of the apportionment formula.²³

Initially, apportionment formulas were used only when a business was a single corporation;²⁴ eventually they were applied by many states to "group[s] of separate corporations performing different functions. . . in different States but engaged in the same unitary business. . . ." ²⁵ The term "unitary tax" now generally refers to the application of formula apportionment to multicorporate entities. Twenty-four states apply the unitary tax to related corporations which operate within the United States.²⁶ Twelve of those states also apply the unitary tax to related corporations which operate both within and outside the United States.²⁷ This version of the unitary tax is also known as the worldwide combined reporting method.²⁸

The preceding discussion on the theory supporting formula apportionment leads inevitably to the question of when the formula should be applied. Constitutional considerations require a state to determine that the activities of a multicorporate entity are "unitary" before the state may impose its apportionment formula on that entity. "[T]he linchpin of apportionability in the field of state income taxation is the unitary-business principle."²⁹ However, there is no bright-line test for what constitutes a unitary business.³⁰ The Court in *Container* provided this

23. KEY ISSUES, *supra* note 11, at 4.

24. *Id.*

25. *Id.*

26. The twenty-four states using the unitary method of taxation are: Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah and West Virginia. *Unitary Taxes: Netherlands Says Decision of Supreme Court Threatens Overseas U.S. Investment*, Daily Tax Report, Sept. 9, 1983, at G-6, 7.

27. The twelve states which apply the unitary tax to the worldwide operations of a business are: Alaska, California, Colorado, Florida, Idaho, Indiana, Massachusetts, Montana, New Hampshire, North Dakota, Oregon and Utah. *Id.*

28. *State Taxes: Conable, Mathias Re-Propose Ban on Worldwide Combined Reporting System*, Daily Tax Report, May 6, 1983, at G-1.

29. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 439 (1980).

30. There is considerable debate over the proper definition of a unitary business. See Hellerstein, *The Basic Operations Interdependence Requirement of a Unitary Business: A Reply to Charles E. McLure, Jr.*, 18 TAX NOTES 723 (1983)(WESTLAW,

rather vague definition: "[T]here [must] be some sharing or exchange of value [between related corporations] not capable of precise identification or measurement—beyond mere flow of funds arising out of passive investment or a distinct business operation—which renders formula apportionment a reasonable method of taxation."³¹ Other definitions of a unitary business include the following: (1) "[A]ny business which is carried on partly within and partly without the taxing jurisdiction,"³² (2) "[E]ither an interstate business which is so integrated as to make separate accounting impossible or as an interstate business in which the in-state activities contribute to the out-of-state business and the out-of-state activities contribute to the in-state business,"³³ and (3) There must a unity of ownership (usually fifty percent or more), operations (staff functions), and use (line functions).³⁴

Florida defines a unitary business group as follows:

[A] group of taxpayers related through common ownership whose business activities are integrated with, are dependent upon, or contribute to a flow of value among the members of the group. When direct or indirect ownership or control is 50 percent or more of the outstanding voting stock, the group shall be considered to be a 'unitary business group' unless clearly shown by the facts and circumstances of the individual case to be a non-unitary business group. When direct or indirect ownership or control is less than 50 percent of the outstanding voting stock, all elements of the business activities shall be considered in determining whether the group qualifies as a 'unitary business group.'³⁵

Florida's statutory definition presumes a unitary group when there is common ownership of fifty percent or more of the outstanding voting stock. While unity of ownership is an important factor, it is only one of several factors that should be considered in determining whether a bus-

FTX-TN database)(Professor Jerome Hellerstein's response to an article by Professor Charles McLure which advocated a centralized management test for a unitary business).

31. *Container*, ___ U.S. at ___, 103 S. Ct. at 2940.

32. Keesling & Warren, *supra* note 6, at 46.

33. Rudolph, *State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups*, 25 TAX L. REV. 171, 184 (1969).

34. *Butler Bros. v. McColgan*, 17 Cal. 2d 664, 678, 11 P.2d 334, 341 (1941), *aff'd*, 351 U.S. 501 (1942).

35. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4853, § 220.03(1)(aa)(West).

iness is unitary. Perhaps in recognition of this, the Florida Department of Revenue allows "[the] presumption [to] be overcome by the facts of the specific case which clearly show the business is not unitary."³⁶ In Florida, as in other states, the determination of whether a business is unitary will have to be made on a case-by-case basis.

States prefer the unitary tax over the arms-length method because the unitary method will more accurately reflect income earned by the in-state activities of a multijurisdictional business. In addition, many states now apply the unitary tax to the worldwide operations of multicorporate entities. The question of whether the operations of a business are in fact unitary is one of constitutional dimension.

B. Constitutional Dimension of the Unitary Tax

The unitary tax is vulnerable to constitutional attack through both the due process clause of the fourteenth amendment³⁷ and the commerce clause.³⁸ The restrictions placed upon state taxation of interstate business by the two clauses are similar and are invoked interchangeably by the courts.³⁹

Under the due process clause, a state may not impose an income tax on "value earned outside its borders."⁴⁰ Thus, before a state may tax extraterritorial business income, there must be "a 'minimal connection' between the interstate activities of the taxing State, and a rational relationship between the income attributed to the State and the intra-state values of the enterprise."⁴¹ If the commerce clause is relied on, the reviewing court must determine whether the tax is "applied to an activity with a substantial nexus with the taxing state, is fairly appor-

36. DEP'T OF REVENUE, STATE OF FLORIDA, NO. F-106, INSTRUCTIONS FOR FILING UNDER THE UNITARY METHOD 4 (Aug. 1983); Weissman, *A Primer on Florida's Unitary Method of Corporate Taxation and Capitalizing on its Idiosyncrasies*, FLA. B. J., Jan. 1984, at 42. See generally Oppenheimer, *Legislators Hear Unitary Tax System Debated*, The Miami Herald, Oct. 25, 1983, at 5D col. 2 (Arthur England criticizing the presumption).

37. U.S. CONST. amend. XIV, § 1.

38. U.S. CONST. art. I, § 8, cl. 3.

39. P. HARTMAN, *supra* note 6, at 12.

40. ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982).

41. Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 436-37 (1980). The due process concept of a "minimal connection" between the in-state and out-of-state values of a business enterprise is analogous to the "minimum contacts" required before a court can invoke long-arm jurisdiction. See *Inter. Shoe v. Washington*, 326 U.S. 310 (1945).

tioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."⁴²

The unitary business concept and formula apportionment of income have been upheld repeatedly by the Supreme Court⁴³ and have been struck down only as applied to a particular business.⁴⁴ In *Container*, the Supreme Court, for the first time, was faced with the question of whether a state could bring the *foreign* subsidiaries of a domestic corporation under the unitary umbrella.

III. The *Container* Decision

A. Facts and Issues Presented

Container Corporation of America (Container), a Delaware corporation headquartered in Chicago,⁴⁵ manufactures and distributes paper-board packaging.⁴⁶ While Container's operations were "largely domestic,"⁴⁷ during the years in question⁴⁸ it owned a controlling interest in twenty foreign subsidiary corporations.⁴⁹

42. *Mobil Oil*, 445 U.S. at 443 (quoting *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

43. *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207 (1980); *Mobil Oil*, 445 U.S. 425; *Moorman Mfg. Co. v. Blair*, 437 U.S. 425 (1978); *Butler Bros. v. McCollgan*, 315 U.S. 501 (1942); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1942); and *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

44. *ASARCO*, 458 U.S. 307; *F.W. Woolworth v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); and *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

45. *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933, 2939, (1983).

46. Brief for Appellant at 2, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), reprinted in BNA's Law Reprints, Vol. 15, No. 8, Part I.

47. *Container*, ___ U.S. at ___, 103 S. Ct. at 2943.

48. The years in question were 1963-1965. *Id.*

49. Brief for Appellant at 2, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), reprinted in BNA's Law Reprints, Vol. 15, No. 8, Part 1. The percentage ownership of the subsidiaries ranged from 67%-100%. *Container*, ___ U.S. at ___, 103 S. Ct. at 2943. The subsidiaries were located in Colombia, Venezuela, Germany, Italy, Mexico, and Holland. An Austrian subsidiary was inactive. A Panamanian subsidiary was a holding company, with no property, payroll, or sales. Under separate accounting, however, it "was assigned \$1.5 million in net income annually. . . ." Brief for Appellee at 7, *Container Corp. of Am. v. Franchise Tax Bd.*,

Container was subject to California's corporate franchise tax because of its activities within the state.⁵⁰ The franchise tax is based on income. Container did not include income from any of its foreign subsidiaries when it calculated its income subject to tax in California.⁵¹ California's Franchise Tax Board (FTB) audited Container's returns for the years in question and determined that Container "should have treated its overseas subsidiaries as part of its unitary business rather than as passive investments."⁵² Following the audit, the FTB issued additional assessments against Container.⁵³ Container paid the assessments and then sued in state court for a refund.⁵⁴ The court of appeal upheld a superior court decision denying the refund,⁵⁵ and Container appealed to the United States Supreme Court.

In a five-to-three⁵⁶ decision, the Supreme Court affirmed. Justice Brennan, writing for the majority, framed the issues as follows:⁵⁷ (1) Was it "proper" to characterize Container and its foreign subsidiaries as a unitary business?; (2) If so, was it "fair" to apply the standard three-factor formula to Container?; (3) Alternatively, was California obligated by the foreign commerce clause⁵⁸ "to employ the 'arms-length' analysis used by the federal government and most foreign nations in evaluating the tax consequences of inter-corporate relationships?"⁵⁹

— U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA's Law Reprints, Vol. 15, No. 8, Part 1.

50. Container "had approximately \$30 million in sales, \$10 million in payroll and \$15 million in property in California. . . ." Brief for Appellee at 6, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA's Law Reprints, Vol. 15, No. 8, Part 1.

51. *Container*, ___ U.S. at ___, 103 S. Ct. at 2944. Container also did not include the payroll, sales, or property of the subsidiaries in the apportionment formula. *Id.* at 2945.

52. *Container*, ___ U.S. at ___, 103 S. Ct. at 2945.

53. *Id.* Container's California tax liability increased \$72,000. *Id.* at ___, 103 S. Ct. at 2945 nn.11-12.

54. *Container*, ___ U.S. at ___, 103 S. Ct. at 2945.

55. *Container Corp. of Am. v. Franchise Tax Bd.*, 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981).

56. Justice Stevens took no part in the decision. *Container*, ___ U.S. at ___, 103 S. Ct. at 2957.

57. *Container*, ___ U.S. at ___, 103 S. Ct. at 2939.

58. U.S. CONST. art I, § 8, cl. 3.

59. *Container* ___ U.S. at ___, 103 S. Ct. at 2939.

B. The Court's Analysis

1. *Test for Unitary Business: Flow of Goods v. Flow of Value*

The Court first considered Container's challenge to the characterization of its relationship with its foreign subsidiaries as that of a unitary business. For its attack to be successful, Container had the "distinct burden of showing by 'clear and cogent evidence' that [California's apportionment tax] result[ed] in extraterritorial values being taxed."⁶⁰ To aid it in meeting this burden, Container urged the Court to adopt a "bright-line" test in making its determination whether Container's business was unitary.⁶¹ Container's suggested test required "a substantial flow of goods"⁶² between mercantile or manufacturing enterprises before a business could be characterized as unitary.⁶³

Container, not surprisingly, failed to meet the requirements of its own test. Container's sales to its subsidiaries constituted "only about 1% of the subsidiaries' total purchases,"⁶⁴ and Container bought no goods from its subsidiaries.⁶⁵ Thus, Container argued that its foreign subsidiaries should not be considered as part of a unitary business.

60. *Id.* at ___, 103 S. Ct. at 2945 (quoting *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 221 (1980). Taxation of extraterritorial values would violate the Due Process Clause. *See supra* text accompanying notes 40-1.

61. *Container*, ___ U.S. at ___, 103 S. Ct. at 2947. *See also* Brief for Appellant at 47, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA's Law Reprints, Vol. 15, No. 8, Part 1. Container, based on the Court's decision in *F.W. Woolworth v. Taxation & Revenue Dep't*, 458 U.S. 354 (1982), also argued that the Court of Appeal had used the wrong legal standard. In *Woolworth*, the Court said that the New Mexico Supreme Court had erred in finding a unitary business based on "the *potentials* of the relationship between Woolworth and its subsidiaries. . .," rather than the *actual* relationship. *Woolworth*, 458 U.S. at 363 (emphasis added). *See also* Brief for Appellant at 43, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in*, BNA's Law Reprints, Vol. 15, No. 8, Part 1. The Court was not persuaded by this argument because, although the lower court alluded to the potential for control by Container, it based its decision on actual control. *Container*, ___ U.S. at ___, 103 S. Ct. at 2946.

62. *Container*, ___ U.S. at ___, 103 S. Ct. at 2947 (quoting Brief for Appellant at 47, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA's Law Reprints, Vol. 15, No. 8, Part 1).

63. *Container*, ___ U.S. at ___, 103 S. Ct. at 2947.

64. *Id.* at ___, 103 S. Ct. at 2943.

65. Brief for Appellant at 4, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983) *reprinted in* BNA's Law Reprints Vol. 15, No. 8, Part 1.

While acknowledging that a substantial flow of goods is a relevant factor, the Court reasoned that it should not be solely determinative.⁶⁶ Rather, the Court looked primarily to the “flow of value” between Container and its subsidiaries to establish the “substantial mutual interdependence” necessary to the finding of a unitary business.⁶⁷

The Court then enumerated the factors relied upon by the lower court to find a unitary business.⁶⁸ The lower court found that Container was involved with its subsidiaries in the following areas: (1) making and guaranteeing loans, (2) major policy review, (3) obtaining equipment, (4) filling personnel needs, (5) corporate expansion, and (6) technical assistance. The Court considered two of these factors to be particularly significant.⁶⁹

First, Container made substantial loans to its subsidiaries and guaranteed loans made to them by third parties. The annual balance of loans outstanding from Container to its subsidiaries was \$7.7 million in 1963, \$7.2 million in 1964 and \$3.2 million in 1965.⁷⁰ The rate of return on these loans ranged from .003% to .018%.⁷¹ Loans guaranteed by Container accounted for approximately one-third of the loans made by third parties to Container’s subsidiaries, “or between \$2.8 and \$3.7 million.”⁷² While the existence of the loans “and the resulting flow in value”⁷³ was significant, the fact that Container failed to show that any of the loans were made at market interest rates⁷⁴ appeared to be the conclusive factor.

Second, while “a unitary business finding could not be based merely on ‘the type of occasional oversight. . .that any parent gives to

66. *Container*, ___ U.S. at ___, 103 S. Ct. at 2947. The Court also noted, however, that one scholar has recommended the flow of goods test and some courts have adopted it as a bright-line test. *Id.* at ___, 103 S. Ct. 2947 n. 17.

67. *Container*, ___ U.S. at ___, 103 S. Ct. at 2947 (quoting *F.W. Woolworth v. Taxation & Revenue Dep’t*, 458 U.S. 354, 371 (1982)).

68. *Container*, ___ U.S. at ___, 103 S. Ct. at 2947.

69. *Id.* at ___, 103 S. Ct. 2948 n.19.

70. Brief for Appellant at 2, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA’s Law Reprints, Vol. 15, No. 8, Part 1.

71. Brief for Appellee at 25 n.7, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA’s Law Reprints, Vol. 15, No. 8, Part 1.

72. *Id.* at 25.

73. *Container*, ___ U.S. at ___, 103 S. Ct. at 2948 n.19.

74. *Id.*

an investment in a subsidiary,' ”⁷⁵ the extent of “the managerial role played by appellant in its subsidiaries’ affairs”⁷⁶ was considerable. Container took no part in the daily operations of its subsidiaries, however, “major policy decisions of the subsidiaries were subject to review by [Container].”⁷⁷ Container had assumed a management position over its subsidiaries that was “grounded in its own operational expertise and its overall operational strategy.”⁷⁸ The Supreme Court found the combination of these factors sufficient to uphold the finding of the lower court that Container and its foreign subsidiaries constituted a unitary business.⁷⁹

2. *Was the Three-Factor Formula Fairly Applied to Container?*

The Court next considered the question of whether there was a “rational relationship between the income attributed to the State and the intrastate values of the enterprise,”⁸⁰ as required by the commerce clause. Container again had the burden of proof, having to establish that such “rational relationship” did not exist.⁸¹ To meet this burden, Container had to prove “that the income apportioned to California under the statute is ‘out of all appropriate proportion to the business transacted [sic] in that state.’ ”⁸²

Container argued that the three-factor formula, when applied to a unitary business that included its particular mix of foreign subsidiaries, would allocate more income to California than was properly attributable to its in-state operations.⁸³ This distortion would occur because wage rates, but not productivity, are lower in the countries in which the subsidiaries are located.⁸⁴ Since payroll is a factor in the apportionment

75. *Id.* (quoting *F.W. Woolworth*, 458 U.S. at 369).

76. *Id.*

77. *Container Corp. of Am. v. Franchise Tax Bd.*, 117 Cal. App. 3d 988, 998, 173, Cal. Rptr. 121, 127, (1981).

78. *Container*, ___ U.S. at ___, 103 S. Ct. at 2948 n.19

79. *Id.* at ___, 103 S. Ct. at 2948.

80. *Id.*

81. *Id.*

82. *Id.* (quoting *Hans Rees’ Sons, Inc. v. North Carolina*, 283 U.S. 123, 125 (1931)).

83. *Container*, ___ U.S. at ___, 103 S. Ct. 2948-9.

84. Brief for Appellant at 15-18, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA’s Law Reprints, Vol. 15, No. 8, Part 1. Container also argued that a higher cost of sales contributed to the shift of

formula, including foreign subsidiaries as part of the unitary business would artificially shift income to California.⁸⁵ Container supported this argument by showing that formula apportionment allocated an average of \$32.1 million of income to the United States, while separate accounting allocated an average of \$28.1 million for the same period.⁸⁶ Justice Brennan correctly dismissed this showing as “precisely the sort of formal geographic accounting whose basic theoretical weaknesses justify resort to formula apportionment in the first place.”⁸⁷ The Court previously stated this basic proposition: “[W]e need not impeach the integrity of that [separate] accounting system to say that it does not prove appellant’s assertion that extraterritorial values are being taxed.”⁸⁸ The Court also noted that since Container’s business was in fact unitary, it was likely that part of the California payroll was contributing to production by the foreign subsidiaries.⁸⁹

The Court acknowledged that formula apportionment is imperfect, correctly noting that; (1) the one-third weighting of the factors is arbitrary; (2) there are more income-producing factors than just property payroll and sales, and (3) the relationship between the three factors and income is only approximate.⁹⁰ However, the Court found that Container had failed to impeach “the basic rationale behind the three factor formula.”⁹¹

3. *Foreign Commerce Clause: Need to Apply Arms-Length Analysis*

Because California’s unitary business was international in scope, the Court had to consider two additional factors “beyond those articulated in [the doctrine governing the commerce clause]. . . .”⁹² These two factors were derived from *Japan Line, Ltd. v. County of Los Ange-*

income to California. *Id.* at 18.

85. *Id.* at 16-18. *See infra* notes 123-27 and accompanying text.

86. Brief for Appellant at 17, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), *reprinted in* BNA’s Law Reprints, Vol. 15, No. 8, Part 1.

87. *Container*, ___ U.S. at ___, 103 S. Ct. 2948.

88. *Butler Bros. v. McColgan*, 315 U.S. 501, 507 (1942).

89. *Container*, ___ U.S. at ___, 103 S. Ct. at 2949.

90. *Container*, ___ U.S. at ___, 103 S. Ct. at 2949 n.20.

91. *Id.* at ___, 103 S. Ct. at 2949.

92. *Id.* at ___, 103 S. Ct. at 2951 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979)).

les.⁹³ The first factor was “the enhanced risk of [international] multiple taxation.”⁹⁴ In *Japan Line*, since there was double taxation in fact the Court did not decide “under what circumstances [the] mere risk of double taxation would invalidate a State tax. . . .”⁹⁵ Second was the “possibility that a state [would] impair federal uniformity in an area where federal uniformity is essential.”⁹⁶ In order to uphold California’s worldwide apportionment tax, the Court had to distinguish *Container* from *Japan Line*.

In *Japan Line*, the Court struck down a California property tax imposed on the shipping containers of a Japanese firm, in part because there was multiple taxation. The Court conceded there was also multiple taxation present in *Container*.⁹⁷ The Court noted, however, that the multiple taxation in *Container*, unlike that in *Japan Line*, was not “inevitable.” Multiple taxation was inevitable in *Japan Line* because the property taxed in California was subject to tax on its full value in Japan.⁹⁸ The multiple taxation in *Container*, on the other hand, was not the inevitable result of applying the worldwide combined reporting method of taxation. Rather, it was “dependent solely on the facts of the individual case”⁹⁹ and could have resulted in a lower tax bill.¹⁰⁰

The Court also found that even if California had adopted the arms-length method there was no guarantee the risk of multiple taxation would be eliminated,¹⁰¹ because of variations in the way the arms-length method is applied in different countries. Definitions and methods of computing income, deductions and credits are not uniform among countries: “The record shows no such identical tax laws between any two countries. . . .”¹⁰²

Finally, the enterprise being taxed in *Japan Line* was foreign

93. 441 U.S. 434 (1979).

94. *Container*, ___ U.S. at ___, 103 S. Ct. at 2951 (quoting *Japan Line*, 441 U.S. at 446).

95. *Japan Line*, 441 U.S. at 452 n.17 (emphasis added).

96. *Container*, ___ U.S. at ___, 103 S. Ct. at 2951 (quoting *Japan Line*, 441 U.S. at 448).

97. *Container*, ___ U.S. at ___, 103 S. Ct. at 2951.

98. *Id.* at ___, 103 S. Ct. at 2952.

99. *Id.*

100. *Id.* at ___, 103 S. Ct. at 2952 n.25.

101. *Id.* at ___, 103 S. Ct. at 2954.

102. Brief for Appellee at 118, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. ___, 103 S. Ct. 2933 (1983), reprinted in BNA’s Law Reprints, Vol. 15, No. 8 Part 1.

owned, and Container is a domestic corporation. In the *Japan Line* decision, the Court specifically left open the issue of taxation of "domestically owned instrumentalities engaged in foreign commerce."¹⁰³

The Court next considered¹⁰⁴ whether formula apportionment, when imposed on an international business, interferes with federal uniformity in foreign commerce, an area which "is pre-eminently a matter of national concern."¹⁰⁵ This occurs when a state tax: (a) involves matters of foreign policy, or (b) contradicts a mandate of the federal government.¹⁰⁶

The Court, distinguishing *Container* from *Japan Line*, briefly discussed three reasons why the tax in *Container* would not implicate matters of foreign policy. First, *Container* was a domestic corporation, while in *Japan Line* the business was located and organized in a foreign country.¹⁰⁷ Second, the *Japan Line* decision was influenced by the fact that the United States and Japan were signators to a pact that allowed containers from either country to be admitted tax free.¹⁰⁸ Third, because *Container* was undeniably subject to tax in California, the same result could have achieved simply by raising the tax rates.¹⁰⁹

The Court also pointed out that the Executive Branch failed to file an *amicus curiae* brief opposing the tax in *Container*.¹¹⁰ In *Japan Line* and *Chicago Bridge & Iron Co. v. Caterpillar Tractor* (a case similar to *Container* and argued the same term),¹¹¹ the Executive Branch had filed a brief opposing worldwide application of the unitary tax.¹¹² The majority interpreted the failure to file a brief as evidence that "the

103. *Container*, ___ U.S. at ___, 103 S. Ct. at 2952 (quoting *Japan Line*, 441 U.S. at 444 n.7). In *Container* the Court left open the question of whether a state could tax "domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries." *Container*, ___ at ___, 103 S. Ct. at 2952 n.26. On Jan. 9, 1984, however, the Court upheld California's right to apply the unitary tax to a foreign parent corporation with domestic subsidiaries. *Alcan Aluminum Ltd. v. Franchise Tax Bd.*, 52 U.S.L.W. 3505 (U.S. Jan. 10, 1984), *aff'g mem.* 558 F. Supp. 624 (S.D.N.Y. 1983).

104. *Container*, ___ U.S. at ___, 103 S. Ct. at 2955.

105. *Japan Line*, 441 U.S. at 448.

106. *Container*, ___ U.S. at ___, 103 S. Ct. at 2955.

107. *Id.*

108. *Id.* (referring to *Japan Line*, 441 U.S. at 452-53).

109. *Id.* at 2956.

110. *Id.*

111. ___ U.S. ___, 103 S. Ct. 3562 (1983), *dismissing appeal from* the Sup. Ct. of Ill., *Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 112, 417 N.E. 2d 1343 (1981).

112. *Container*, ___ U.S. at ___, 103 S. Ct. at 2956.

Executive Branch. . .[is] not seriously threatened”¹¹³ by application of the unitary business concept to a domestically based international business. *Chicago Bridge* was dismissed shortly after the decision in *Container* “for want of a substantial federal question.”¹¹⁴ *Container* then filed for a rehearing to allow the Executive Branch to file a brief opposing the tax as it had in *Chicago Bridge*,¹¹⁵ however, the Executive Branch did not support the rehearing and it was dismissed.¹¹⁶

Justice Brennan then discussed the lack of a federal mandate requiring the Court to ban California’s tax. The United States is a party to many tax treaties with foreign governments that use the “arms-length analysis in taxing the domestic income of multinational enterprises.”¹¹⁷ These treaties, however, are not applicable to the states, and the arms-length method is waived when a government taxes its own corporations.¹¹⁸ The Court also pointed out that Congress had withdrawn a ban on worldwide apportionment from a tax treaty with the United Kingdom.¹¹⁹ Finally, the Court noted the lack of Congressional action to ban the states’ use of worldwide apportionment.¹²⁰

C. The Dissent

Justice Powell focused his dissent¹²¹ primarily on the issue of multiple taxation. Taking issue with the majority, Powell said that multiple taxation was the inevitable result of the worldwide combined reporting method of taxation as used by California in *Container*.¹²² He discussed

113. *Id.*

114. *Supreme Court: Illinois Unitary Tax Case Dismissed*, Daily Tax Report, July 6, 1983, at G-6.

115. *State Taxes: Unitary System Threatens Investment in U.S., Japanese Government Warns*, Daily Tax Report, Sept. 14, 1983, at G-5, 7.

116. *Tax Policy: Administration Sets Up Task Force To Study Worldwide Unitary Tax Method on Firms*, Daily Tax Report, Sept. 23, 1983 at G-3.

117. *Container*, ___ U.S. at ___, 103 S. Ct. at 2956.

118. *Id.*

119. *Id.*

120. *Id.* See H.R. 11798, 98th Cong., 2d Sess. (1967); S. 1245, 93rd Cong., 1st Sess. (1973); S. 2080, 94th Cong., 1st Sess. (1975); H.R. 5076, 96th Cong., 1st Sess. (1980); S. 1688, 96th Cong., 1st Sess. (1980) (congressional attempts restricting the use of formula apportionment by the states). See *infra* note 194 for current congressional attempts to restrict formula apportionment.

121. *Container*, ___ U.S. at ___, 103 S. Ct. at 2957 (Chief Justice Burger and Justice O'Connor joined the dissent).

122. *Container*, ___ U.S. at ___, 103 S. Ct. at 2958.

two reasons for his position.

First, he was persuaded by Container's argument that because wage rates, property values and prices for goods sold were higher¹²³ in California than in the foreign countries where the subsidiaries were located, formula apportionment improperly shifted income away from the foreign countries to California.¹²⁴ Formula apportionment is based on the presumption that one dollar of property, payroll, and sales will produce roughly the same amount of profit in each jurisdiction. When variations in wage rates, property values and sales prices are dramatic, income will be shifted to the jurisdiction where the values are highest.¹²⁵ Since the foreign countries used the arms-length method, the income which was shifted to California would be taxed both in California and the foreign countries. The resulting multiple taxation, Powell contended, violated the first test of the foreign commerce clause articulated in *Japan Line*.¹²⁶ Justice Powell's reliance on this element of Container's case is misplaced. A comparison of the dollar value of payroll, sales and property required to produce one dollar of net income showed the United States ranked second, third and third respectively out of the six countries in which Container operated.¹²⁷

Second, although conceding there could be multiple taxation even if California adopted the arms-length method,¹²⁸ Powell was willing to accept this risk of multiple taxation because it was the result of different applications of the same (arms-length) method and thus not "inevitable."¹²⁹ On the other hand, Powell felt, multiple taxation was inevitable under the worldwide combined reporting method because of the "fundamental inconsistency" between the two different methods of allocating income.¹³⁰ As the majority noted, however, application of world-

123. Brief for Appellant at 15-18, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. at ___, 103 S. Ct. 2933 (1983), reprinted in BNA's Law Reprints, Vol. 15, No. 8, Part 1.

124. *Container*, ___ U.S. at ___, 103 S. Ct. at 2958.

125. J. HELLERSTEIN & W. HELLERSTEIN, *STATE AND LOCAL TAXATION* 538-539 (4th ed. 1978).

126. *Container*, ___ U.S. at ___, 103 S. Ct. at 2957-2958. See *supra* notes 97-100 and accompanying text.

127. See Brief for Appellant at 18, *Container Corp. of Am. v. Franchise Tax Bd.*, ___ U.S. at ___, 103 S. Ct. 2933 (1983), reprinted in BNA's Law Reprints, Vol. 15, No. 8, Part 1.

128. *Container*, ___ U.S. at ___, 103 S. Ct. at 2958.

129. *Id.* at ___, 103 S. Ct. at 2959.

130. *Id.*

wide combined reporting can result in reduced taxes.¹³¹ For example, when a parent corporation is making a profit and its out-of-state subsidiaries are losing money (or are merely less profitable), the subsidiaries' operations will reduce the portion of the corporation's total income subject to the apportionment formula.

Justice Powell also addressed the question of whether California's tax prevented the government from speaking with "one voice."¹³² He concluded that it did, "because it seriously 'implicates foreign policy issues which must be left to the federal government.'"¹³³ Powell failed to develop fully the reasons for this conclusion. Instead, he speculated about "sensitive matters of foreign relations"¹³⁴ and American investments in foreign countries.¹³⁵ He also raised the spectre of foreign reaction were California to apply its tax to a foreign parent corporation.¹³⁶ While this is an interesting question, it was not at issue in *Container*. Six months later, however, the Court declined to review a lower court holding that California could impose such a tax on a foreign parent corporation.¹³⁷

Justice Powell also disagreed with the majority over the failure of the Executive Branch to file an *amicus curiae* brief.¹³⁸ Powell believed the failure to file a brief did not imply the government had changed its position opposing the worldwide application of formula apportionment. At the time his point was well taken. However, since *Container*, the Executive Branch has decided to study the issues surrounding the tax rather than oppose it.¹³⁹

IV. Impact of Container Decision

A. Florida's Reaction

Two weeks after the decision in *Container*, Florida became one of

131. *Id.* at ___, 103 S. Ct. 2952 n.25.

132. *Id.* at ___, 103 S. Ct. at 2959.

133. *Id.* (quoting the majority at ___, 103 S. Ct. at 2955).

134. *See Id.* (quoting *Japan Line*, 441 U.S. at 456.)

135. *Container*, ___ U.S. at ___, 103 S. Ct. at 2959.

136. *Id.*

137. *See supra* note 103 and accompanying text.

138. *Container*, ___ U.S. at ___, 103 S. Ct. at 2960. *See supra* notes 110-16 and accompanying text.

139. *See infra* notes 198-200 and accompanying text.

twelve states¹⁴⁰ to extend the unitary tax to the worldwide operations of a business.¹⁴¹ The tax was enacted at special session under the pressure of a school budget clash between Governor Graham and the legislature. The Governor initially vetoed the school budget approved by the legislature because, at \$3.6 billion, it was \$283 million below his recommendations.¹⁴² Faced with the prospect of a school system unable to pay its bills, an agreement was reached to raise the additional funds sought by the Governor.¹⁴³ In addition to modifying the unitary tax, the legislature increased property and alcohol taxes as part of a \$233 million package designed to fund the new state education budget.¹⁴⁴ There is a disagreement, however, over how much additional revenue the unitary tax will actually raise. Revenue collections are \$30 million less than anticipated after two months under the unitary tax.¹⁴⁵

The legislature has been criticized for the hasty manner in which the complex unitary tax provisions were adopted.¹⁴⁶ Business had no opportunity to provide input on (or lobby against) a matter which has direct impact on their interests. Responding to negative business reaction to the unitary tax, Florida Secretary of State George Firestone called for a special legislative session to repeal the tax. The Governor's cabinet defeated Firestone by a vote of five-to-one.¹⁴⁷ Lt. Governor

140. *Unitary Tax: Netherlands Says Decision of Supreme Court Threatens Overseas U.S. Investment*, Daily Tax Report, Sept. 9, 1983, at G-6, 7.

141. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848 (West). Governor Graham signed Senate Bill 3C on July 19, 1983. FLORIDA LEGISLATURE, HISTORY OF LEGISLATION, SPECIAL SESSION C, at 1-2.

142. Ollove, *Graham Vetoes Schools Budget: Will Fight for Dramatic Tax Increase*, The Miami Herald, July 1, 1983, at 1A, col. 4.

143. Ollove, *Graham, Leaders Near Pact on New Taxes for Schools*, The Miami Herald, July 7, 1983, at 1A, col. 2. Senate President Curtis Peterson (D., Lakeland) agreed to support the tax increase for education after the governor agreed to restore funding for the Miss Teenage America Beauty Pageant in Lakeland. The governor's aides, however, insisted the timing was just a coincidence. Ollove, *Beauty of a Coincidence Leaves Graham, Peterson Sitting Pretty*, The Miami Herald, July 9, 1983, at 1A, col. 1.

144. Ollove & Doig, *School Taxes Survive Final Battle*, The Miami Herald, July 13, 1983, at 1A, col. 1. This article reports the total tax package at \$237 million. Later accounts placed the figure at \$233 million. Oppenheimer, *Save-Way Threatens to Leave State*, The Miami Herald, Aug. 5, 1983, at 1E, col. 2.

145. Birger, *Abolishing Unitary Tax to be Business Priority*, The Miami Herald (Business/Monday), Jan. 16, 1984, at 10, col. 1.

146. Sundberg, *State Business Tax Climate Went from Sunny to Bleak*, Ft. Lauderdale News/Sun-Sentinel, Nov. 27, 1983, at 5E, Col. 1.

147. Doig, *4 Cabinet Members Back Governor on Unitary Tax*, The Miami Her-

Wayne Mixson also advocated repeal.¹⁴⁸ To make up for revenue lost by repeal of the tax, Firestone suggested increased fees for drivers license, death certificates, occupational permits and corporate charters.¹⁴⁹ Governor Graham, however, has said he will oppose repeal unless business-related taxes or fees make up for revenue lost by repeal of the unitary tax.¹⁵⁰ Florida Representative John Cosgrove (Coral Gables) has pre-filed a bill for the 1984 legislative session that would effectively repeal the unitary tax.¹⁵¹ Cosgrove's Coral Gables district has over one hundred multinational businesses.¹⁵² In response to criticism of the new tax and perhaps to quiet those advocating its repeal, the Governor appointed a commission to study the issue.¹⁵³ Robert Lanzillotti, Dean of the University of Florida's College of Business Administration, was appointed chairman of the commission.¹⁵⁴ Two months after Lanzillotti's appointment the commission voted to repeal most of the tax because of negative business reaction.¹⁵⁵ However, it is unlikely that Florida's 160 legislators will be able to agree on an alternative source of funding to replace the revenue generated by Florida's version of the worldwide combined reporting method of taxation.¹⁵⁶

ald, Oct. 19, 1983, at 8A, col. 1.

148. Prendergast, *Graham, Mixson Butting Heads on Merit of New Tax*, Ft. Lauderdale News/Sun-Sentinel, Oct. 8, 1983, at 1A, col. 2.

149. *Firestone Seeking Review of Tax Laws*, The Miami Herald, Oct. 17, 1983, at 6B, col. 5.

150. Doig, *Graham Issues Warning on Unitary Tax*, The Miami Herald, Jan. 5, 1984, at 9D, col. 2.

151. H.B. 1, Fla. Leg. 1984 (proposed bill for April, 1984 legislative session).

152. Askari, *Battle Begins Over Florida Multinational Tax*, The Miami Herald, July 12, 1983, at 1D, col. 2.

153. Anderson, *Panel to Study Tax on Business*, Ft. Lauderdale News/Sun-Sentinel, Nov. 12, 1983, at 1B, col. 5.

154. Bellew, *UF Business Dean Named to Unitary-Tax Panel*, The Miami Herald, Nov. 12, 1983, at 4B, col. 2.

155. Birger, *Governor's Panel Votes to Dump Unitary Tax*, The Miami Herald, Feb. 18, 1984 at 9D, col. 2. The commission recommended retention of that portion of the unitary tax which ended the exemption on overseas sales. *Id.* at col. 3. See *infra* note 160 and accompanying text.

156. Oppenheimer, *Senator Says Unitary Tax Will Stand*, The Miami Herald, Feb. 24, 1984, at 1B, col. 2. Governor Graham has recently indicated he would support the elimination of the worldwide income portion of the tax. If the legislature follows the governor's suggestion, which seems likely, the major objection to the tax of international businesses would be eliminated. The loss of revenue to the state would be approximately \$15 million. *Graham Changes Stand on Unitary Tax*, The Miami Herald, Mar. 24, 1984, at 4B, col. 2.

In adopting the worldwide combined reporting method of taxation, the Florida Legislature amended eight existing sections¹⁵⁷ of the tax code and created two new sections.¹⁵⁸ The majority of the tax increase, however, was accomplished by changing only four of the code sections. First, Florida effectively adopted worldwide combined reporting merely by redefining the terms "state" and "everywhere" to include any foreign country.¹⁵⁹ Second, the deduction for income earned on overseas sales was disallowed.¹⁶⁰ Florida had been the only state which excluded all foreign source income for state corporate tax purposes.¹⁶¹ Third, Florida became the twenty-eighth state¹⁶² to adopt the "throwback" rule.¹⁶³ The throwback rule allows taxation of a sale by the origination state (Florida) if the destination state does not tax the sale. Generally, sales of tangible personal property are taxed in the state the property is delivered or shipped to, the destination state. Fourth, non-business income (net rents and royalties, capital gains and losses, interest and div-

157. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4857-64 (West). Five sections of the tax code were amended in addition to those discussed *infra* notes 159-166 and accompanying text. First, § 220.131 was amended to conform provisions dealing with the adjusted federal income of affiliated groups to the rest of the tax code. Second, § 220.14(3) was amended to permit only one exemption to members of a unitary group. Third, § 220.15 (4) was amended by deleting refund provisions. Fourth, § 220.63(5) was amended by deleting a cross reference which had allowed a deduction from net income for international banks. Fifth, § 220.64 was amended to make certain portions of the new tax applicable to banks.

158. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4858-61 (West). The first new code section, § 220.135, requires all members of a unitary business group to use the unitary method and sets out the procedures which must be employed. The second new code section, § 220.16 relates to the allocation of non-business income.

159. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4853, 4859 (West). The term "state" is defined in § 220.03(1)(t). The term "everywhere" is defined in § 220.15(3). Section 220.15 relates to the apportionment formula and the apportionment of adjusted federal income to Florida.

160. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4856 (West). Parts (a)(b), and (c) of § 220.13(1)(b) were deleted.

161. Fesperman, *New Tax Law Stings Multinational Firms*, The Miami Herald (Business/Monday), Aug. 18, 1983, at 4, col. 1.

162. See GOV'T. ACCOUNTING OFFICE, REPORT BY THE COMPTROLLER GENERAL, KEY ISSUES AFFECTING STATE TAXATION OF MULTIJURISDICTIONAL CORPORATE INCOME NEED RESOLVING 165 (1982) (hereinafter cited as KEY ISSUES).

163. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4852, § 214.71(3)(a)(West). The statutory basis of the throwback rule is contained in the UNIF. DIV. OF INCOME FOR TAX PURPOSES ACT, 7A U.L.A. 91 (1978). For a more complete discussion of the throwback rule see Cappetta, *supra* note 8, at § 44.02[1].

idends, and patents and copyrights)¹⁶⁴ is no longer subject to apportionment. Instead, it may be allocated entirely to Florida. Whether a particular item of non-business income is allocable to Florida varies with the nature of the item. For example, interest and dividends are allocable to Florida only if the corporation's commercial domicile is located in Florida.¹⁶⁵ Previously, Florida was one of only eleven states which apportioned all or nearly all of a corporation's income.¹⁶⁶

The international business community strongly opposes Florida's new tax.¹⁶⁷ They argue that because of the increase in taxes on multinationals, new businesses will not settle here and existing businesses might leave or at least not expand their operations in Florida.¹⁶⁸ Senator Paula Hawkins' office has released a list of twenty-four companies threatening such action¹⁶⁹ and at least twenty business organizations have joined together to oppose the tax.¹⁷⁰ Because no business wants to pay additional taxes, opposition by multinationals to the new tax is predictable.¹⁷¹ However, the way the new tax is perceived is also important. Opponents of the tax claim that the perception of Florida as

164. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4861, § 220.16(West).

165. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4862, § 220.16(3)(West).

166. KEY ISSUES, *supra* note 162, at 65.

167. See Doig, *4 Cabinet Members Back Governor on Unitary Tax*, The Miami Herald, Oct. 19, 1983, at 8A, col. 1 (IBM, Motorola, Coca Cola, American Cyanamid, Sony, and the Insurance Exchange of America testify against the new tax at hearing); Birger, *Graham Gets Pressure to Repeal Unitary Tax*, The Miami Herald (Business/Monday), Oct. 17, 1983, at 3, col. 1 (Windmere Corp. reduces Florida inventory); *Multinational Firms Hire Miami Lawyer to Fight Unitary Tax*, The Miami Herald, Oct. 15, 1983, at 4B, col. 5 (Arthur England, former Justice of the Florida Supreme Court, hired to represent 29 multinationals - including Aluminum Co. of America, Gulf Oil, Honeywell, Texaco, TRW and Xerox); *Sony Blasts Florida's Unitary Tax*, The Miami Herald, Oct. 14, 1983, at 1E, col. 2 (Sony reconsiders investments in Florida).

168. See Oppenheimer, *Study Fuels Banks' Drive Against New State Tax*, The Miami Herald (Business/Monday), Sept. 19, 1983, at 54, col. 1; Oppenheimer, *International Bankers Fear Unitary Tax*, The Miami Herald, Sept. 15, 1982, at 1C, col. 2; Fesperman, *New Tax Law Stings Multinational Firms*, The Miami Herald (Business/Monday), Aug. 18, 1983, at 5, col. 1.

169. *Unitary Taxes: Hawkins Bill Would Speed Recommendations of Administration Task Force*, Daily Tax Report, Nov. 1, 1983, at G-2.

170. Oppenheimer, *Groups Banding Together to Seek Repeal of New Tax*, The Miami Herald (Business/Monday), Aug. 1, 1983, at 12, col. 2.

171. See generally Cappetta, *supra* note 8, (for a more detailed analysis of corporate opposition to the unitary tax method).

a state with a favorable business climate has been severely damaged.¹⁷² "What is true for a corporation is not reality, but perception, and the perception of this is bad."¹⁷³

The impact on Florida's business growth resulting from any negative perception (or the reality of a tax increase) is difficult to measure because of conflicting signals. IBM and Pratt & Whitney have said they will not move out of the state¹⁷⁴ and reports of new businesses coming to Florida continue despite the unitary tax.¹⁷⁵ For example, Evans Products Company, with annual sales of \$1.5 billion, is planning to move its headquarters to Miami.¹⁷⁶ In addition, IBM recently announced plans to double expenditures in 1984 for new construction and equipment for its Boca Raton, Florida-based Entry System Division.¹⁷⁷ On the other hand, IBM also recently announced plans to sell two thousand acres of land near Gainesville, Florida because "the state is an unattractive place to build factories."¹⁷⁸ Furthermore, Save-Way Industries has threatened to leave the state because it estimates its tax bill will increase from \$20,000 in 1982 to \$180,000 in 1983.¹⁷⁹ These conflicting signals have led to confusion over the impact of the unitary tax.

Confusion over the economic impact of the unitary tax may be illustrated by the response to IBM's recently announced cancellation of

172. Lawrence, *Unitary Tax Killing Business, C of C Told*, The Miami Herald, Nov. 30, 1983, at 8D, col. 2.

173. Doig, *Corporate, State Officials Square Off on Unitary Tax*, The Miami Herald, Nov. 3, 1983, at 15C, col. 1. A cartoon accompanying a commentary by former Florida Supreme Court Justice Alan Sundberg reflects the purported negative perception: Two workers are putting up a roadside billboard which reads "Keep Out!" On the ground is the sign they have just take down; it reads "Welcome to Florida." Sundberg, *State Business Tax Climate Went From Sunny to Bleak*, Ft. Lauderdale News/Sun-Sentinel, Nov. 27, 1983, at 5E, col. 1.

174. Fesperman, *supra* note 168, at col. 5.

175. An analysis by the Federal Reserve Bank of Atlanta forecasts a bright economic future for Florida and notes "[h]igh growth, high-technology companies are flocking to the state. . . ." Koch, Whigham & Steinhauser, *Florida Expecting a Boom*, ECONOMIC REV., Feb. 1984, at 20.

176. Russell, *Evans Will Bring its Main Office to Miami*, The Miami Herald, Jan. 20, 1984, at 1E, col. 4.

177. Askari, *IBM Division Plans to Double Spending*, The Miami Herald, Mar. 16, 1984, at 1E, col. 3.

178. Askari, *IBM Blames Unitary Tax for Sale of Land*, The Miami Herald, Feb. 2, 1984, at 5C, col. 2.

179. Oppenheimer, *Save-Way Threatens to Leave State*, The Miami Herald, Aug. 5, 1983, at 1E, col. 1.

further expansion in Boca Raton. Newspaper accounts cited the unitary tax as the primary reason for the cancelled expansion.¹⁸⁰ The unitary tax, however, was not the primary reason for the cancellation: "I can understand someone finding an issue and publicizing it as the reason we did it, and I'm not saying [the unitary tax] isn't a reason, but it is not the only reason."¹⁸¹ In 1983 IBM experienced substantial growth in the Boca Raton/Delray Beach area. The local workforce increased from 6,300 to 7,800 and its facilities increased by 800,000 square feet to 3.6 million. Anticipating further expansion, builders approached IBM about leasing additional space. A routine management review, however, indicated it would be prudent to curtail expansion for three reasons: (1) The change in Florida's business climate resulting from the unitary tax; (2) Concern that over-expansion of its South Florida operations would have a negative impact on the manageability of those operations; and (3) The impact on community services of further growth in an area where its facilities are already expansive. IBM's decision may cost Florida jobs and property tax revenue. The extent of any loss is difficult to quantify because part of the expansion was designed to relieve existing congestion, however, IBM has no plans to expand its South Florida operations in another state in lieu of Florida.¹⁸² Indeed, two months after the widely publicized cancellation of its expansion plans, IBM announced plans to increase expenditures at its Boca Raton facilities because of the success of the IBM Personal Computer.¹⁸³ Whether this confusion is by design or by accident, one point is clear: complex business decisions of this nature are not made solely on the basis of one factor.

While a state's corporate income tax structure is an important consideration in the choice of one state over another, it is by no means the only factor. Even if Florida's tax climate has changed there are several other factors in its favor, including; low labor costs, a sparsely

180. *IBM Decision Shows Why Florida Should Void Tax*, Ft. Lauderdale News/Sun-Sentinel, Jan. 21, 1984, at 22A, col. 1; Stemle, *Unitary Tax Causes Project Cancellation*, The Monday Paper (Delray Beach), Jan. 16, 1984, at 3A, col. 1; Askari, *IBM Shelves Expansion Plans, Cites Unitary Tax*, The Miami Herald, Jan. 14, 1984, at 4B, col. 2; De George, *IBM Scraps S. Florida Expansion Plans*, Ft. Lauderdale News/ Sun-Sentinel, Jan. 14, 1984, at 1A, col. 1.

181. De George, *supra* note 180, at col. 4 (quoting Dan Scherer, IBM Information Manager in Boca Raton, Florida).

182. Telephone interview with Dan Scherer, IBM Information Manager in Boca Raton, Florida (Jan. 20, 1984).

183. Askari, *supra* note 177.

unionized workforce, easy access to international markets, high population growth rate, and favorable weather conditions. Florida's corporate tax rate of five percent is one of the lowest in the nation¹⁸⁴ and is mandated by the state constitution.¹⁸⁵ Additionally, Florida does not impose a tax on personal income. Indeed, a recent report by the federal Commerce Department ranked Florida forty-ninth out of fifty states in the percentage of personal income taken by state and local taxes.¹⁸⁶ All these factors will continue to make Florida attractive to business.¹⁸⁷

While the impact of the tax on Florida's economic growth is debatable, the version of the tax adopted by Florida is subject to valid criticism on at least three points. First, instead of using an equally weighted apportionment formula, Florida is one of only four states¹⁸⁸ to assign a weight of fifty percent to sales and twenty-five percent each to payroll and property.¹⁸⁹ Altering the standard formula in this manner distorts the apportionment of income among the states.¹⁹⁰ Second, foreign members of a unitary group are not allowed to deduct net operating losses, net capital losses, or excess contributions.¹⁹¹ Third, Florida presumes a unitary business group when common ownership is fifty percent or more of outstanding stock.¹⁹² While this presumption may

184. Only three states have a lower corporate income tax rate than Florida: Michigan - 2.35%, MICH. COMP. LAWS ANN. § 208.31(1)(West Supp. 1982); Oklahoma - 4%, OKLA. STAT. ANN. tit. 68, § 2.355(c); (West Supp. 1983); Utah - 4%, UTAH CODE ANN. § 59-13-3 (Supp. 1983).

185. FLA. CONST. art. VII, § 5(b). The Constitution would have to be amended or revised to change the corporate tax rate.

186. *Tax Burden: State by State*, U.S. News & World Report, Dec. 26, 1983-Jan. 2, 1984, at 18.

187. See generally Oppenheimer, *More Foreign-Owned Firms Building Plants in Florida*, The Miami Herald (Business/Monday), July 25, 1983, at 38, col. 1. As evidence of the attractiveness of the state for multinational businesses, "the number of foreign-owned manufacturing plants has almost doubled [to 203] in the past 3 years. . . ." *Id.*

188. KEY ISSUES, *supra* note 162, at 62. Two other states modify the standard apportionment even further: West Virginia employs a two-factor (payroll, property) formula and Iowa uses a one-factor (sales) formula. *Id.*

189. FLA. STAT. § 220.15(4)(1981).

190. See Cappetta, *supra* note 8, at § 44.02[1].

191. Taxation-Multi-State Businesses, 1983 FLA. SESS. LAW SERV. 4848, 4856, § 220.13(1)(b)(1)(d)(West). Deductions under Internal Revenue Code §§ 170(d)(2), 172, 1212, and 404 are denied to foreign members of a unitary group.

192. See *supra* notes 35-6 and accompanying text.

be overcome, control alone should not be sufficient to raise it in the first place.¹⁹³

B. National Reaction

Even before the decision in *Container*, legislation was introduced in the Ninety-Eighth Congress to ban states from using the worldwide combined reporting system.¹⁹⁴ The proposed legislation is based on the concern over multiple taxation and opposition to the taxing method by foreign governments.¹⁹⁵

The Administration is under intense pressure from those who favor the tax and those who oppose it. Multinational businesses and foreign governments want *Container* overturned or legislatively overruled,¹⁹⁶ while the states and proponents of states rights¹⁹⁷ want *Container* left intact. President Reagan responded to the pressure by refusing to seek Supreme Court review of the *Container* decision, an act interpreted as a victory for the states.¹⁹⁸ Instead, the President formed a task force to

193. Weissman, *A Primer on Florida's Unitary Method of Corporate Taxation and Capitalizing on its Idiosyncrasies*, FLA. B. J., Jan. 1984, at 42. See *supra* notes 35-6 and accompanying text.

194. S. 1225, 98th Cong., 1st Sess., 129 Cong. Rec. S. 6145 (1983). H.R. 2918, 98th Cong., 1st Sess., 129 Cong. Rec. H. 2697 (1983). The two bills were introduced in May 1983. See also *State Taxes: Conable, Mathias Re-Propose Ban on Worldwide Combined Reporting System*, Daily Tax Report, May 6, 1983, at G-1.

195. *State Taxes: Conable, Mathias Re-Propose Ban on Worldwide Combined Reporting System*, Daily Tax Report, May 6, 1983, at G-1.

196. See *Unitary Taxes: Netherlands Says Decision of Supreme Court Threatens Overseas U.S. Investment*, Daily Tax Report, Sept. 19, 1983, at G-6 (Netherlands asks United States to strike down worldwide application of the unitary tax); *State Taxes: Unitary System Threatens Investment in U.S., Japanese Government Warns*, Daily Tax Report, Sept. 14, 1983, at G-5 (Japan asks United States to abolish the unitary tax); *Tax Policy: Administration Unitary Tax Position Undergoing Close Cabinet Scrutiny*, Daily Tax Report, Aug. 16, 1983, at K-1, 4 (Great Britain asks the United States to join Container's petition for rehearing).

197. House Minority Leader Michel (R-Ill.), in a letter to President Reagan, expressed his opposition to any Administration interference with the *Container* decision. *Tax Policy: Administration Tax Position Undergoing Close Cabinet Scrutiny*, Daily Tax Report, Aug. 16, 1983, at K-1, 3.

198. Lyons, *Reagan Elects Not to Continue Legal Fight Against 'Unitary' Tax*, The Miami Herald, Sept. 24, 1983, at 4B, col. 2; Bacon, *Reagan's Delay on Unitary Tax is Victory For States but May Spark Trade Problems*, Wall St. J., Sept. 26, 1983, at 8, col. 2.

study issues surrounding the worldwide combined reporting method.¹⁹⁹ Major issues to be considered by the task force include the proper definition of a unitary business and how to apply the three factor formula to international businesses.²⁰⁰ As a result of the President's response, legislative action is unlikely at the next session of Congress²⁰¹ and the task force is no longer considering federal legislation as a course of action.²⁰²

Pressure from international business and foreign governments may eventually lead to some modification of the worldwide combined reporting method. However, because estimates of additional state revenue from the tax range from \$600-\$900 million annually,²⁰³ a Congressional ban on the tax is unlikely.

V. Conclusion

In *Container*, the Supreme Court upheld the right of states to employ the worldwide combined reporting method of taxation. By dismissing a similar case after reaching its decision in *Container*, the Court sent a clear message that any action against the use of this method of taxation is a matter for Congress and the President, not the Court.

The President has temporarily side-stepped the issue by appointing a task force to study the matter. This move effectively precludes Congressional action, placing the issue on the back burner while adopting a

199. *Unitary Tax: Reagan to Seek Global Task Force to Solve Problem of State Use of Unitary System*, Daily Tax Report, Sept. 22, 1983, at G-4.

200. *Tax Policy: Administration Sets up Task Force to Study Worldwide Unitary Tax Method on Firms*, Daily Tax Report, Sept. 23, 1983, at G-3, 5. The task force is now known as the Worldwide Unitary Tax Working Group. *Unitary Taxes: Treasury Announces Members of Reagan's Working Group*, Daily Tax Report, Oct. 28, 1983, at G-2.

201. *Tax Policy: Administration Sets Up Task Force to Study Worldwide Unitary Tax Method on Firms*, Daily Tax Report, Sept. 23, 1983, at G-3, 6. A Mathias assistant is quoted as saying "[t]hey've killed our bill. . . ." *Id.* See generally *supra* note 194.

202. *Unitary Tax: Reagan Panel Hosts First Meeting, Appoints Staff-Level Task Force*, Daily Tax Report, Nov. 2, 1983, at G-5.

203. *Tax Policy: Administration Sets Up Task Force to Study Worldwide Unitary Tax Method on Firms*, Daily Tax Report, Sept. 23, 1983, at G-4. California alone earns \$500 million from the tax. *Id.* If additional states adopt the tax, pressure against any Congressional action banning the tax would necessarily increase.

wait-and-see attitude on any foreign retaliation.²⁰⁴ If none is forthcoming, there is little chance of any federal action banning the use of the tax by the states.

In Florida, the potential for action against the tax is a much closer call. Multinationals may have the political support to attempt repeal of the tax at the next legislative session. If they can substantiate their claims of negative economic impact, and at the same time offer an alternative business source for funding the state education budget, they may succeed in their drive to repeal the tax. Florida would once again be a tax haven for multinationals.

The unitary tax should not be repealed, unless an alternative *business-related* source of funding the education budget can be established. Florida's international business community will directly benefit from a better educated workforce from which to draw employees and thus should assume more of the burden of educating that workforce.

Even if the unitary tax is not repealed the legislature should address the three primary criticisms of Florida's version of the tax.²⁰⁵ First, Florida should employ an equally weighted apportionment formula rather than the current sales-weighted formula. Second, Florida should permit foreign members of a unitary group to deduct certain losses currently disallowed. Finally, a unitary business group should not be presumed solely on the basis of fifty percent or more common ownership of outstanding stock.

Scot Simpson

204. An analysis by the Advisory Committee on Intergovernmental Relations (ACIR) of 12 states using the unitary method showed "no noticeable retaliations from foreign governments or a drop in foreign investment." *State Taxes: Bipartisan Commission Opposes Ban on Worldwide Combined Reporting System*, Daily Tax Report, May 31, 1983, at G-4, 5. *But see Tax Policy: Administration Sets Up Task Force to Study Worldwide Unitary Tax Method On Firms*, Daily Tax Report, Sept. 23, 1983, at G-3 ("several investment projects. . .cancelled").

205. See *supra* notes 188-193 and accompanying text.